June 12, 2023

The Honorable Beth Robinson
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson,

I hope this letter finds you well. I am a rising 3L at Berkeley Law where I received top 5% academic distinction for 2L year and top 10% for 1L year, and I am writing to apply for a clerkship with you for the 2024-2025 term.

I want to clerk for you because I want to learn from you specifically. I am a gay Vermonter who wants to work on behalf of the people of Vermont for my career, and I am inspired by you and your life's work. My mentor and former boss Bridget Asay has also urged me to apply for a clerkship in your chambers. A few Vermont Supreme Court clerks who worked with you before you were appointed to this bench told me that you were an incredibly hard worker who really believes in the work and in your obligations. I see myself in that description, and I think getting to work for and learn from you would be the best possible training for my future advocacy.

I have seen firsthand how powerful courts can be in working towards justice. This past semester, I was a clinical student with the East Bay Community Law Center (EBCLC) working on eviction defense. In one matter, I wrote an emergency motion to vacate a default judgment. In a matter of days, my elderly client and I went from meeting for the first time just before her stay expired to filing a motion to protect her housing. My client had both the facts and the law on her side, but until the Court ordered the default vacated, she was going to be put out on the streets. Though the work I did was necessary to convince the judge to act, it was the judge’s action that saved my client. I want to work inside that judicial process not just to learn how best to persuade the court as an advocate, but also to actively participate in bringing disputes to the correct outcome under the law.

Your work requires diligence and precision. I bring both. My legal training began with several years spent as a litigation fellow at a law firm, where much of my job was to ensure briefs were meticulously checked. I was frequently the last person to touch briefs to be filed at every level of court, and my firm trusted me to play traffic-cop with filing-day edits coming from multiple attorneys all revising slightly different versions of the brief. I have carried this care with me through law school and built upon it. With EBCLC, my focus on details helped me navigate complex and opaque federal bureaucracy for my clients receiving housing subsidies. With the Vermont Human Rights Commission last summer, this skill served me well in working to map the universe of facts onto the relevant precedent to figure out what the results should be. I anticipate building on my skills further this summer with the ACLU of Vermont.

I hope to schedule an interview with you soon. Enclosed are my resume, transcript, undergraduate transcript, writing sample, and letters of recommendation. Thank you for your consideration.

Best wishes,
Ariel Murphy

Ariel Murphy

ariel.murphy@berkeley.edu | ariel.lauren.murphy@gmail.com | 201-669-2824

Education

University of California, Berkeley, School of Law | Berkeley, CA
J.D. Candidate, Class of 2024 & Harvard-Berkeley Exchange Program for 2023-2024

Honors: Academic Distinctions: top 5% of 2L class; top 10% of 1L class
Jurisprudence Award (first in class), Contracts; Prosser Award (second in class), Evidence

Activities: *Berkeley J. of Employment and Labor Law*, Senior Exec. Ed. 2023-24, Exec. Ed. 2022-23

Yale University | New Haven, CT
B.S., Mechanical Engineering (ABET), May 2018

Honors: 2018 Silliman Cup winner (senior who contributed most to the college)
Academic commendations for Calculus III, Physics II

Activities: Yale Political Union, President & Vice-President & Chair of Liberal Party
Student Tech Collaborative, Ruby on Rails Web Developer
Berkeley College Orchestra, Cellist

Experience

Vermont ACLU | Montpelier, VT — Summer 2023
Law Intern

East Bay Community Law Center | Housing Clinic | Berkeley, CA — Fall 2022
Clinical Student
Provided full-service representation to low-income tenants. Drafted dispositive motions and discovery. Wrote reasonable accommodation letters. Successes included restoring possession to a tenant who had been evicted and winning a significant rent reduction for a tenant with severe habitability issues.

East Bay Community Law Center | Tenant's Rights Workshop | Berkeley, CA — Sept. 2021 – present
TRW Member 2021-2022, Co-Leader for 2022-2023 school year
Conducted intake interviews with clients for Berkeley Law pro bono project. Under attorney supervision, provided legal advice to tenants. Drafted letters regarding quiet enjoyment, harassment, and/or habitability concerns to landlords on behalf of low-income tenants. As co-leader, trained and oversaw new students.

Vermont Human Rights Commission | Montpelier, VT — Summer 2022
Law Intern
Drafted reports for lay Commissioners based on facts and law about whether to find discrimination in housing, public accommodations, and employment complaints. Drafted decisions on motions to dismiss. Attended witness interviews. Conducted legislative history research into VT's anti-discrimination laws.

Dept. of Finance and Management | Montpelier, VT — 2020 – 2021
Executive Assistant
Provided staff support for the Commissioner of Finance and Management and for the Secretary of the Agency of Administration. Finalized the Governor's proposed budget documents. Summarized legislative testimony pertaining to the budget and other topics. Responded to public records requests.

Stris & Maher LLP | Montpelier, VT — 2018 – 2020
Litigation Fellow
Drafted portions of non-infringement charts for intellectual property litigation under attorney supervision. Confirmed and corrected citations, proofread, and prepared exhibits to briefs and letters. Reviewed and sorted documents for further attorney review in discovery. Prepared productions of documents in discovery.

Interests

Science fiction, both reading and watching | Cooking | Gardening | Bread-making | Painting | Camping

Berkeley Law
University of California
Office of the Registrar

Ariel L Murphy
Student ID: 3036283288
Admit Term: 2021 Fall

Academic Program History
Major: Law (JD)

Awards

Prosser Prize 2022 Spr: Evidence
Jurisprudence Award 2022 Spr: Contracts

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Sean Farhang	5.0	5.0	H
LAW	201	Torts Daniel Farber	4.0	4.0	H
LAW	202.1A	Legal Research and Writing Patricia Plunkett Hurley	3.0	3.0	CR
LAW	230	Criminal Law Jonathan Simon	4.0	4.0	H

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Patricia Plunkett Hurley	2.0	2.0	P
LAW	202F	Contracts Prasad Krishnamurthy	4.0	4.0	HH
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Jennifer Chacon	4.0	4.0	H
LAW	241	Evidence David Oppenheimer	3.0	3.0	HH
LAW	245	Negotiations **Units Count Toward Experiential Requirement** Em Landon	3.0	3.0	HH

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	32.0	32.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	207.5	Advanced Legal Writing **Fulfills 1 of 2 Writing Requirements** Emily Berry	3.0	3.0	H
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	HH
LAW	289	EBCLC Seminar Rosa Bay Zoe Polk	2.0	2.0	CR
LAW	295.1P	Bk Jour Empl Labor Kathleen Vanden Heuvel	1.0	1.0	CR
LAW	295.5Z	EBCLC Clinic **Units Count Toward Experiential Requirement** Rosa Bay Zoe Polk	5.0	5.0	CR

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	47.0	47.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	210	Legal Profession **Fulfills Professional Responsibility Requirement** David Jargiello	2.0	2.0	HH
LAW	223	Administrative Law Kenneth Bamberger	4.0	4.0	HH
LAW	243.51	Designing Government Services **Units Count Toward Experiential Requirement** Nicole Zeichner	1.0	1.0	CR
LAW	273.1	Land Use Law Andrew Schwartz	3.0	3.0	H
LAW	285.69	Property, Theory & Soc Justice **Fulfills 1 of 2 Writing Requirements** Gregory Alexander	2.0	2.0	H
LAW	297	Self-Tutorial Sem David Oppenheimer	2.0	2.0	CR

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

Berkeley Law
University of California
Office of the Registrar

Ariel L Murphy
Student ID: 3036283288
Admit Term: 2021 Fall

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	61.0	61.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	299.1	Harvard Law Exchange	12.0	12.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	61.0	61.0

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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Harvard Law School

Unofficial Transcript

Ariel Lauren Murphy
JDNM-BEX

June 10, 2023

Fall 2023 Term: Aug 30 - Dec 15

Code	Title	Instructor	Grade	Credits
2086	Federal Courts and the Federal System	Field	~	5.00
2505	Supreme Court Decision Making	Singer	~	2.00
2484	Race & The Law: America's Ongoing Struggle with Changing Conceptions of Race	Robinson	~	3.00
			Projected Subtotal:	10.00

Winter 2024 Term: Jan 2 - Jan 19

Code	Title	Instructor	Grade	Credits
2249	Trial Advocacy Workshop	Sullivan	~	3.00
			Projected Subtotal:	3.00

Spring 2024 Term: Jan 22 - May 10

Code	Title	Instructor	Grade	Credits
2234	Taxation	Kaplow	~	4.00
2048	Corporations	Ramseyer	~	4.00
			Projected Subtotal:	8.00

Projected Total: 21.00

March 16, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to recommend Ariel Murphy for a clerkship in your chambers. I had the pleasure of teaching Ariel in my Advanced Legal Writing Class in the fall of 2022. Ariel is a gifted writer and hard-working student who performed exceedingly well in my class. Her legal aptitude earned her an Honors grade.

In all three of her major writing assignments, Ariel demonstrated solid engagement with the material and an ability to respond to constructive criticism in order to further improve her writing. Ariel demonstrated a maturity and preparedness that separated her from her peers.

In her final assignment, Ariel wrote a brief addressing whether an English-only policy in the workplace violated Title VII of the Civil Rights Act. Ariel's brief emphasized the facts most favorable to her side, neutralized her opponent's best facts, and brought in the most relevant caselaw for analogies. What set her brief apart from the other students' work was her ability to weave in a persuasive theme in the introduction, statement of facts and argument sections of her brief. In addition to her strong analytical and persuasive skills, Ariel's training as a litigation fellow prior to entering law school sharpened her attention to detail. Ariel meticulously edited her brief, and her final draft was free of spelling, grammar and other mistakes common in law student work.

Ariel is not only bright; she is ambitious and committed. From my first interaction with Ariel during office hours, she spoke of her passion for living in Vermont and her desire to work in public interest litigation. Her commitment to public service is evident by the fact that she has performed over 120 hours of pro bono work since starting law school.

As a law student, she has taken advantage of every opportunity to hone her oral and written advocacy skills. Ariel is an associate editor of the Berkeley Journal of Employment and Labor Law and an active member of the Tenants' Rights Workshop. She also has the distinction of being in the top ten percent of her 1L class, and received the Jurisprudence Award in Contacts and the Prosser Prize in Evidence.

Finally, Ariel is a well-rounded and thoughtful individual. As a college student, she was a Silliman Cup Winner, awarded to a senior who contributes most to the college campus. She is a well-respected member of her class and consistently treats fellow students and professors with respect. In everything Ariel does, she shows remarkable dedication and commitment. Given what I know of Ariel, her interactions with counsel, co-clerks, and court personnel alike would be uniformly professional and positive. And her sharp research and writing skills will ensure high-quality bench memos.

In sum, I am thrilled to support Ariel in this process. Please feel free to contact me at (512) 557-4597 or eberry@berkeley.edu if you would like to further discuss Ariel's qualifications.

Sincerely,

Emily Berry
Professor of Advanced Legal Writing
University of California, Berkeley School of Law

March 2, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Ariel Murphy

Dear Judge Robinson:

I am very happy to recommend my former student and current research assistant Ariel Murphy for a judicial clerkship. She is among our top students at Berkeley, and an enthusiastic learner and researcher. And she is a kind- and good-hearted person whom I am very glad to know. I believe she'll be an excellent law clerk and lawyer.

I got to know Ariel in the second semester of her first year at Berkeley when she was a student in my Evidence course. She was an enthusiastic participant in class, with reliably insightful observations and questions. I was always glad to see her hand raised, and was not surprised that she earned the second-highest grade in the class, although she was competing with 2L and 3L students.

On the topic of competing in class, I share with you a passage from the clerkship candidate questionnaire that we ask our students to fill out. Ariel wrote, *"I'm an active participant in my classes, because I'm a big believer that you get out of anything what you put into it. Law school is a prerequisite to the work I want to do, so I am here, but I'm going to make the most of it. But I am not aggressive or a gunner: I freely share my notes and outlines with peers because I believe that 1) grades are not a good metric for learning, and 2) class in general would be better if everyone were prepared to discuss and think about the work before us. In one of my classes this semester with an unusual lecture structure, I set up a class-wide google doc to share our notes, because it seemed like the best way to keep the class together. I never want to be the sort of person that hoards information or resources, and I try to structure my work in service of that value."*

This year Ariel is working with me on a book I'm writing on the history of the idea of diversity, tracing its origins to the 19th century reforms of the University of Berlin and the theories of learning promulgated in the mid 19th century by John Stuart Mill and Harriet Taylor Mill. Ariel is responsible for three chapters, including helping me track down sources, suggest edits, and fix citations on a chapter on Justice Frankfurter and academic freedom. She is a tenacious researcher, finding sources in multiple archives. Her reading of legal cases and other texts is careful and reliable. Her editorial suggestions have been uniformly helpful. She is one of the very best research assistants I've worked with in over forty years of teaching.

Ariel's grades from her first three semesters put her very near the top of a very talented group of students. All of her grades are either Honors (top 40%) or High Honors (top 10%). She has won academic awards in Contracts (#1 in class) and my Evidence course (#2 of approximately 70 students). Given Ariel's academic success, it would be reasonable to expect her to have been buried in the books. But outside of class she earned leadership positions on our Berkeley Journal of Employment and Labor Law and our Tenant's Rights Workshop, a student pro bono project. Regarding pro bono, Ariel wrote in her clerkship questionnaire that "I strongly believe that I have an obligation to serve my community and to work for those with the least support. I try to live my life in service of this obligation: working for pro bono projects that protect tenants, editing worker-side academic articles, and treating those around me with kindness. Every time I face a big decision, I consider whether each option enacts my values. As of the end of January 2023, I have worked more than 120 hours on pro bono matters since starting law school."

In sum, Ariel Murphy is making her mark at Berkeley Law as a strong and enthusiastic student, a diligent researcher, and a hard-working leader of a law review and a pro bono project. I have every confidence that she will be an excellent lawyer and (more to the point) an excellent law clerk. She has my highest recommendation.
Please feel free to contact me regarding this recommendation. I can be reached by email at doppenheimer@law.berkeley.edu or by phone at 510/326-3865.

Sincerely,

David B. Oppenheimer
Clinical Professor of Law

March 30, 2023

Re: Clerkship Letter of Recommendation for Ariel Murphy

To Whom It May Concern:

My name is Laura Bixby and I am a staff attorney and clinical supervisor in the East Bay Community Law Center's (EBCLC) Housing Unit. EBCLC is the largest clinical program at UC Berkeley Law School, and the largest provider of free legal services to low-income residents of Alameda County. I am writing this letter in support of my former student, Ariel Murphy.

I have supervised a number of law students over my career, both in my current role as a clinical supervisor at EBCLC as well as in my former role as a public defender at the Orleans Public Defenders, where I supervised two law students every summer. Ariel stands out from all the law students I have worked with in the past. Ariel has the rare combination of being extremely hardworking, extremely intelligent, and extremely compassionate, all at the same time.

During fall semester 2022, I supervised Ariel in our clinical program for second- and third-year law students. In our program, students represent low-income tenants in fast-paced eviction lawsuits. In California, these eviction lawsuits are typically set for trial 30-60 days after the filing of the underlying complaint, which requires students to produce high-quality work product on tight deadlines. In addition to representing tenants facing eviction, our students also assist tenants with other issues, primarily related to rent-controlled and subsidized housing. These are complex areas of law, which are difficult for many students to familiarize themselves with. But not Ariel.

Ariel is able to quickly master any area of law, even ones she is completely unfamiliar with. She is an efficient legal researcher; on multiple occasions, I posed a difficult legal question to her and she provided me with an accurate and thorough answer within hours. She is also an excellent and quick legal writer. During her semester in our program, she drafted motions and briefs that required almost no edits on my part, which is unusual for law student work. Above all, Ariel is supremely competent and reliable. Our law students juggle courses and extracurriculars as well as their clinical work and that can often mean that clinical work falls through the cracks or requires follow-up on my part. But when I gave Ariel a task, I could always feel confident that she would complete it on time and up to the standard I expect.

Ariel worked on many cases during her clinical semester, but two stand out in particular. In one case, Ariel assisted a tenant living in a rent-controlled apartment who had lived without basic habitability standards such as heat and hot water for years. Ariel built a

2921 Adeline Street, Berkeley, CA 94703
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EAST BAY
COMMUNITY
LAW CENTER

relationship with the client and investigated the case, gathering evidence of all of the problems in the apartment and how long they had been left unrepaired. Using the information she had gathered, Ariel singlehandedly wrote a brief requesting rent abatement and refund before the city rent board. Ariel contacted supporting witnesses and prepared them, along with our client, to testify at the rent board hearing. We engaged in mediation on the day of the hearing, which resulted in the client receiving a refund of almost $17,000 in rent due to the apartment's poor conditions. What's more, the landlord agreed to finally repair all of the problems. Without Ariel's strong preparation, the landlord would certainly not have agreed to mediation, nor to such a favorable settlement.

In another case, an elderly, terminally ill client came to us after a default judgment had already been obtained against her in her eviction case and she had already been locked out of her apartment. When a tenant is already out of possession, we face an uphill battle trying to reopen the case. I told Ariel that this client had come through our intake line, that it would be a lot of work to try and reopen her case, and that we likely would lose. I offered Ariel the option to say no to working on the case, given the circumstances, but Ariel insisted that she wanted to try and help this tenant against the odds. On a quick deadline, Ariel interviewed the client and her family members and researched and wrote a motion to set aside the default judgment. Ariel was determined and produced high-quality work despite knowing it would likely be fruitless. Against all odds, we ended up winning our motion—and ultimately got the eviction case dismissed. As a result, this client was able to get back into her longtime home, where she lived out her remaining months without threat of eviction, all thanks to Ariel's hard work.

I clerked for a federal appellate judge after law school, and I can say with confidence that if you hire her, Ariel will be one of the best law clerks you have ever had. Many lawyers are smart, focused, and hardworking, but lack compassion and judgment. Others excel at building client relationships but can't wrestle with complicated issues of statutory interpretation. Ariel succeeds at both types of legal skills. She will quickly master the issues in any case you assign her, but will also think carefully about the implications any decision will have on real-world individuals, both present and future. I strongly and wholeheartedly recommend her for a clerkship in your chambers. Please do not hesitate to contact me if you have any additional questions or concerns. I can be reached at 510-548-4040 extension 603 or lbixby@ebclc.org.

Thank you,

Laura Bixby

2921 Adeline Street, Berkeley, CA 94703
t 510.548.4040 *f* 510.548.2566 www.ebclc.org

I wrote this brief for a writing class in the fall of 2022. You will see no redactions as there was no actual client. All the writing is my own.

Background: a restaurant that sits on the edge of the Navajo Nation in Arizona forbade its mostly Navajo workforce from speaking Navajo. The EEOC brought a Title VII employment discrimination suit on behalf of the Navajo workers. This motion opposes the restaurant's summary judgment motion.

BERKELEY LAW ADVANCED LEGAL WRITING
Ariel Murphy
University of California, Berkeley School of Law
Berkeley, CA 94720
Telephone: (510) 555-3200

Attorney for Plaintiff
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. SEAN MILLER, *et al.*, d/b/a BURGER STOP, Defendants.	CIVIL ACTION NO. 22-3424

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

For decades, the United States government took Navajo children from their families and forbade them to learn or speak Navajo. Today, the Navajo language is central to the culture and identity of the Navajo Nation. When Defendants, owners of the Burger Stop restaurant, implemented an English-only policy prohibiting Navajo employees from speaking Navajo to each other, those burdened employees felt an echo of their past. Unlike their forefathers, however, Burger Stop's Navajo employees have a chance at justice: Defendants can be held accountable for violating Title VII's prohibition of discrimination based on national origin.

To defeat Defendants' motion for summary judgment, Plaintiff need only establish a genuine dispute of material fact and show that Defendant is not entitled to judgment as a matter of law. Plaintiff can readily meet this burden for each phase of its disparate impact Title VII discrimination claim.

First, Plaintiff can establish a prima facie case of national origin discrimination because Defendants' English-only policy has a significant adverse effect on Navajo employees. Defendants' draconian enforcement of the policy both creates a hostile work environment and adversely affects Navajo employees' privilege of speaking on the job.

Next, Plaintiff disputes the validity of the business reasons that the Defendants purport justify their policy. To establish a "business necessity," any proffered reason must be compelling enough to outweigh the policy's discriminatory impact. Defendants' reasons fail because the policy is overbroad, is not tailored to address the core problem of inappropriate employee behavior, and because managers already speak Navajo.

Finally, Plaintiff can offer several less discriminatory alternatives to Defendant's English-only policy, including implementing an anti-harassment policy and requiring employees to come forward when they hear derogatory comments from colleagues.

Because Plaintiff can establish its case of national origin disparate impact discrimination at trial, the Court should deny Defendants' motion for summary judgment.

II. Statement of Facts

Defendant Sean Miller, along with his wife and son, owns Burger Stop, a restaurant along the border of the Navajo Nation. Miller Dec. ¶ 4. More than half of its customers and more than 90% of its employees are Navajo and speak Navajo fluently. *Id.* ¶ 5. All its employees also speak English. *Id.* ¶ 6. Despite having operated this business for more than 25 years, none of the Defendants speak or understand any Navajo. *Id.* ¶ 4. They have supervised their Navajo-speaking workforce with the support of three Navajo-speaking shift managers. Miller Depo. 9:19-24. The shift managers oversee the restaurant during the 64 hours that the Defendants are not present, of the 84 hours the restaurant is open each week. *Id.* at 9:8-18.

In August of 2021, Defendants posted a "No Navajo" sign in several places in the restaurant. Miller Dec. ¶ 7; Pierce Dec. ¶ 4. That fall, they noticed that employee retention dropped and that they were losing customers. Miller Dec. ¶ 8. They removed their "No Navajo" signs. *Id.* ¶ 7. Around the same time, other customers and employees, mixed Navajo and not, complained about the lack of professionalism among some employees, including using profanity and making offensive comments. *Id.* ¶ 9. In November, Lily Hunt, a female Navajo employee, told Defendants that two male Navajo coworkers were making sexual comments to her in Navajo. *Id.* Other employees could hear these comments and customers were sometimes nearby. Hunt Depo. 3:16-22. After Ms. Hunt informed Sean Miller about the sexual comments, he talked to the offending employees and the comments stopped. *Id.* at 3:23-25. Customers and employees stopped complaining about offensive comments as well. Tsosie Dec. ¶ 5; Miller Depo. 12:13-16.

Yet in early January of 2022, Defendants met with their employees and announced a new English-only policy. Miller Dec. ¶ 13; Pierce Dec. ¶ 5. The English-only policy ("Policy") stated:

> The owner of this business can speak and understand only English. While the owner is paying you as an employee, you are required to use English at all times. The only exception is when the customer cannot understand English. If you feel unable to comply with this requirement, you may find another job.

Id. (emphasis in original). At the meeting, Defendants orally informed its employees that the Policy did not apply at lunch but did not modify the written policy. Pierce Dec. ¶ 5. Many employees agreed to the Policy as written because they did not want to lose their jobs. *Id.* Suzanne Pierce, one of the Navajo employees, asked Defendants to revoke the Policy and instead institute rules banning *all* offensive speech, but they refused. Pierce Dec. ¶ 8. Pierce was immediately fired, along with three other Navajo employees who refused to sign the Policy. *Id.* ¶ 6. The terminated employees spoke English, but worked more efficiently in Navajo, their first language; each found that using English can take two or three times as long as using Navajo. *Id.* None of the terminated employees were ever accused of inappropriately using Navajo. *Id.* ¶ 7. Many Navajo employees substitute Navajo words inadvertently when speaking in English. *Id.*; Hunt Depo. 1:13-17; Diaz Dec. ¶ 7. The terminated employees felt the Policy would unfairly punish them for their linguistic slips. Pierce Dec. ¶ 7.

Within a month of instituting the Policy, Defendants formally reprimanded one of their remaining Navajo employees for warning customers and staff about a wet floor. Miller Dec. ¶ 16; Pierce Dec. ¶ 10. The Policy does not exempt accidental uses of Navajo from punishment. Miller Dec. ¶ 13. Meanwhile, Defendants do not apply the Policy against languages other than Navajo: Sarah Miller speaks Polish to her son Brett in the restaurant without any consequence. Miller Depo. 10:11-12; Pierce Dec. ¶ 8. The Navajo employees recognize this double standard and feel it exploits them. Pierce Dec. ¶ 8.

Despite the Defendants' explanation that they instituted the Policy to "enhance [their] ability to recruit new employees," they have not yet been able to replace the employees they fired for refusing to sign the Policy. *Compare* Miller Dec. ¶ 12 *with* Miller Depo. 12:10-12. Business has also not improved. Miller Depo. 12:13-15. Other local fast-food restaurants comparable to Burger Stop do not have English-only policies and report no problems caused by their employees using Navajo and Spanish to talk among themselves. Pierce Dec. ¶ 9; Hunt Depo. 1:18-3:2.

III. Argument

A. The record establishes that Plaintiff defeats summary judgment at each stage of the Title VII burden-shifting framework.

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact" and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The burden is on the movant to show that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-movant's evidence "is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment must be denied if the non-movant produces enough evidence to create a genuine issue of material fact. *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

B. Summary judgment is inappropriate because Plaintiff can prove a prima facie case of discrimination, contest the business necessity defenses asserted, and show that there are less discriminatory alternatives to Defendants' English-only policy.

Under Title VII of the Civil Rights Act of 1964, employers may not discriminate against employees based on their national origin "with respect to [their] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (2018). Employees need not prove that the discrimination is intentional where they can show their employer's practices or policies have a disparate impact on a protected class of workers. *Garcia v. Spun Steak*, 998 F.2d 1480, 1484 (9th Cir. 1993) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

Courts apply a three-step burden shifting framework to evaluate employees' disparate impact claims. *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1271 (9th Cir. 1981). First, the Plaintiff must establish a prima facie case of discrimination by identifying "a specific, seemingly neutral practice or policy that has a significantly adverse impact on persons of a protected class." *Spun Steak*, 998 F.2d at 1486. Next, the burden shifts to the Defendant to attempt to show that the challenged practice or policy

"is job related for the position in question and consistent with business necessity." *Id*. Only if the Defendant meets this high burden, the Plaintiff then must demonstrate the "availability of an effective business alternative with less disparate racial impact" that equally serves the business purposes. *Contreras*, 656 F.2d at 1275.

Plaintiff here defeats summary judgment at each stage of the burden shifting framework. First, Plaintiff can establish a prima facie case because Burger Stop's English-only policy ("Policy") has a significant adverse impact on its Navajo employees. Second, Plaintiff can introduce evidence sufficient for a reasonable juror to find that Burger Stop lacks a business need for the Policy. Finally, Plaintiff can show that Burger Stop has less discriminatory alternatives to satisfy its alleged business needs.

1. Plaintiff can establish a prima facie case of disparate impact because the Policy has a significant adverse effect on Navajo employees.

To state a prima facie case, Plaintiff must prove that the effect of Defendants' English-only policy falls on a protected class, that the adverse effects are significant and relate to the conditions, terms, or privileges of employment, and that the whole employee population is not affected by the policy to the same extent. *Spun Steak*, 998 F.2d at 1486. On summary judgment, the degree of proof necessary to establish a prima facie case of a Title VII claim is minimal and need not rise to a preponderance of the evidence. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

Here a reasonable juror could conclude that the Policy has significant adverse impacts on Navajo workers' conditions of employment by creating a hostile work environment and by denying them the privilege of speaking on the job.

a. The Policy creates a hostile work environment for Navajo employees in the workplace.

An English-only policy contributes to a hostile work environment where it "exacerbate[s] existing tensions," is "combined with other discriminatory behavior," or is "enforced in a draconian fashion." *Spun Steak*, 998 F.2d at 1489. Whether an English-

only policy creates a hostile work environment amounting to discrimination requires a fact-intensive inquiry based on the "totality of the circumstances." *Id.* at 1488-89.

The Ninth Circuit in *Spun Steak* found that employees could not establish that Spun Steak's English-only policy created a hostile work environment. *Id.* at 1489. There, the employees put forward no evidence beyond conclusory statements that the English-only policy contributed to an "atmosphere of isolation, inferiority or intimidation" and there was substantial evidence in the record that the Defendants enacted the policy to prevent bilingual employees from using Spanish to bully and intimidate non-Spanish-speaking employees. *Id.*

On the other hand, in *Premier*, the court found that the draconian enforcement of Premier's English-only policy led to a hostile work atmosphere for bilingual employees. *EEOC v. Premier Operator Services, Inc.*, 113 F. Supp. 2d 1066, 1075-76 (N.D. Tex. 2000). Premier's policy applied at lunch, during breaks, when taking personal calls, and even after work if the employee was still in the building. *Id.* at 1069. The court found, after expert testimony, that prohibiting bilingual employees from speaking Spanish with other Spanish speakers not only made the employees uncomfortable but was "tantamount to [intimidation]." *Id.* at 1070. The employees were "constantly on guard to avoid uttering their native language." *Id.* at 1075. The court also considered evidence that the President and CEO used ethnic slurs in finding a hostile work environment. *Id.* at 1071.

Here, Defendants enforce the Policy in such a draconian fashion that the enforcement itself amounts to harassment. *See Spun Steak*, 998 F.2d at 1489. Defendants formally reprimanded a Navajo employee for warning customers and staff about a wet floor.[1] Miller Dec. ¶ 16; Pierce Dec. ¶ 10. This type of warning is the sort of thing that an employee calls out without thinking and using whatever language comes to mind first.

[1] The record is unclear about whether this employee's use of Navajo was even a violation of the Policy as written. The Policy exempts communications with customers who cannot understand English, and there is no record as to who heard the wet-floor warning. Enforcing the Policy in this situation indicates that the Defendants were not just enforcing it as written but also sought to avoid hearing Navajo from their employees at all.

Defendant's assertion that uttering this warning in Navajo was a "categorically more serious offense" fails to recognize that any Navajo speaker would need to be "constantly on guard to avoid uttering their native language" in any such hazardous situation. *See Premier*, 113 F. Supp. 2d at 1075. Defendants told employees that Policy violations could lead to losing shift preferences, and that even unintentional slips would be punished. Miller Dec. ¶¶ 13-14. As in *Maldonado*, where the policy made Hispanic employees feel the rule was "hanging over" them, here the Navajo employees fear punishment for unintentional linguistic slips every day. *See Maldonado v. City of Altus*, 433 F.3d 1294, 1301 (10th Cir. 2006).

Defendants' Policy is coupled with "other discriminatory behavior" that, taken together, constitutes a hostile work environment. *See Spun Steak*, 998 F.2d at 1489. Months before the meeting where employees were told to sign the Policy or be immediately fired, Defendants posted several "Please, No Navajo" signs in the restaurant. Pierce Dec. ¶¶ 4-6; Miller Dec. ¶ 7. Posting that sign suggests Defendants' animus against Navajo employees, just like the supervisor in *Maldonado* forbidding employees from speaking Spanish prior to implementing the formal English-only rule there provided evidence of intentional discrimination.[2] *See Maldonado*, 433 F.3 at 1308. Defendants allow Sarah Miller to speak Polish to her son Brett in the restaurant without any consequence. Miller Depo. 10:11-12; Pierce Dec. ¶ 8. Defendants' double standard makes Navajo employees feel exploited and contributes to an atmosphere of tension in the workplace. Pierce Dec. ¶ 8.

Defendants' reliance on *Maldonado* and *Premier* to establish a lack of egregious discriminatory behavior is misplaced. Though those plaintiffs experienced racial taunting and slurs by their coworkers not present here, they also reported feeling "exploited," "alienated," and "like second-class citizens," much like the Navajo employees. *See Maldonado*, 433 F.3d at 1301; *Premier*, 113 F. Supp. 2d. at 1075-76. Burger Stop's

[2] Plaintiff need not prove intentional discrimination to succeed on its disparate impact discrimination claims. *See Griggs*, 401 U.S. at 431.

proximity to the Navajo Nation, against the backdrop of the history of suppression of Navajo, makes Defendants' discriminatory conduct even more concerning. *See* Diaz Dec. ¶¶ 4-6. A reasonable juror could find that Burger Stop's "No Navajo" sign coupled with this distinct cultural backdrop contributes to a hostile and oppressive work environment.

Moreover, the Policy is so broad that it is "tantamount to [intimidation]." *See Premier*, 113 F. Supp. 2d at 1070. Though Defendants orally informed its employees that the Policy did not apply at lunch, the written policy has no such exception. Pierce Dec. ¶ 5. Many employees agreed to the Policy as written because they did not want to lose their jobs. *Id.* As in *Premier* and *Maldonado*, a reasonable juror could find that a blanket prohibition on bilingual employees speaking to each other in Navajo amounts to a hostile work environment. *See Premier*, 113 F. Supp. 2d at 1075-76; *Maldonado*, 433 F.3d at 1305-06. Even if the Policy does not apply at breaks, it still applied at *all* other times. Miller Dec. ¶ 14. Defendant's restaurant is supervised by Navajo supervisors and staffed by Navajo employees[3]; the Millers are only present for 20 hours out of the 84 that the restaurant is open each week. Miller Depo. 9:8-18. Like the employees in *Premier*, the Policy forces Navajo employees to constantly guard against "uttering their native language," even when all the employees in the store are Navajo. *See Premier*, 113 F. Supp. 2d at 1075. The Policy's overbroad scope amounts to intimidation, creating a hostile work environment for Navajo employees.

b. The Policy denies Navajo employees the privilege of conversing enjoyed by monolingual English speakers.

An English-only policy denies employees the privilege of speaking when employees cannot "readily comply with the English-only rule." *Spun Steak*, 998 F.2d at 1487 (citing *Gloor*, 618 F.2d at 270). A strictly enforced policy makes it harder for bilingual employees to comply. *Id.* at 1488. If a company "impose[s] penalties for minor slips of the tongue," the policy adversely impacts the privilege of speaking at work. *Id.*

[3] Approximately 90% of Burger Stop's employees are Navajo. Miller Dec. ¶ 5. All of Burger Stop's Navajo employees speak Navajo. Miller Depo. 9:24.

In *Spun Steak*, the Ninth Circuit found that an English-only policy did not deny bilingual Hispanic employees the privilege of speaking because the employees could readily comply,[4] and because the employer did not impose penalties for minor slips of the tongue. *Id.* at 1488. There, a meat and poultry company implemented an English-only policy limited to conversations "in connection with work," which did not include lunch and break time, and which included a request not to use Spanish to humiliate colleagues. *Id.* at 1483. The employees there were production line workers who did not interact with customers. *Id.* The employer did not strictly enforce its policy, as "some workers continued to speak Spanish without incident." *Id.* Because the employer was not enforcing the policy against employees who "on occasion, unconsciously substitute a Spanish word in the place of an English one," the policy did not deny bilingual employees who could comply with the policy a privilege of employment. *Id.* at 1488.

In contrast, the *Premier* court found that a strict English-only policy denied bilingual Hispanic employees the privilege enjoyed by their monolingual English-speaking coworkers because the policy penalized involuntary uses of Spanish. 113 F. Supp. 2d at 1075-76. There, a long-distance phone operator company forbade its Hispanic employees from speaking in Spanish except when helping a Spanish-speaking

[4] Defendants cite a string of cases purportedly showing that several federal courts have adopted an "ability to comply" standard to evaluate whether employees are disparately impacted by their employers' English-only policies. Defendants' cases do not stand for the rule described. An employee's ability to comply must be considered in the context of how strictly the policy is enforced; enforcement against minor slips that are not volitional creates a disparate impact. *See Spun Steak*, 998 F.2d at 1488. *See also Gloor*, 618 F.2d at 270 (finding no disparate impact because the case was not a situation where "an employee inadvertently slipped into using a more familiar tongue"); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (finding no disparate impact because all of the relevant speech was fully volitional); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730, 732 (E.D. Pa. 1998) (finding no disparate impact because the policy was not enforced against the plaintiff's use of another language); *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 941 (E.D. Va. 1995) (same). And the last case Defendants cited did not address a plaintiff's ability to comply at all. *See Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991) (evaluating business necessity defenses to an English-only policy).

customer, even during breaks and when on personal calls. *Id.* at 1069. The court relied on expert testimony from a linguist that "code switching" occurs involuntarily when bilingual employees are speaking informally with other bilingual employees of their cultural group, particularly after helping a Spanish-speaking customer. *Id.* at 1070. Since Hispanic employees of the company faced reprimand or termination if they violated the English-only rule, even if their non-compliance were unintentional, the court found the policy had a disparate impact. *Id.* at 1073.

Navajo employees here cannot readily comply with the Policy because they are working in a bilingual environment and their use of Navajo is not always volitional. Defendants' Policy does not exempt accidental uses of Navajo from punishment. Miller Dec. ¶ 12. Bilingual people have a propensity to "code switch," which is an unconscious switch from English to Navajo. Diaz Dec. ¶ 7. The unconscious switching is particularly common when speaking informally with members of the same cultural group or following a conversation with a customer in Navajo. *Id.* Just like in *Premier*, when the court found that involuntary code switching put Hispanic employees at risk of violating the English-only policy, so too here, does involuntary code switching put Navajo employees at risk of punishment not faced by their non-Navajo colleagues. *See* 113 F. Supp. 2d at 1070. This situation is different from *Spun Steak*, where employees were not required to switch between Spanish and English or to speak with customers at all, because here the Navajo employees were hired because of their ability to speak Navajo to customers. Pierce Dec. ¶ 8; *see Spun Steak*, 998 F.2d at 1483.

Defendants rely on *Spun Steak* to incorrectly assert that Navajo employees needing to "catch themselves" before speaking Navajo does not impose a significant enough burden to deny them equal opportunity. But the *Spun Steak* policy did not punish "minor slips" of the tongue. 998 F.2d at 1488. Defendant's Policy does, creating a unique risk of punishment for Navajo employees. Defendant enforced the Policy against an employee who called out in Navajo to warn customers and staff about a wet floor. Miller Dec. ¶ 16; Pierce Dec. ¶ 10. Unlike enforcement against employees using Spanish to

harass and bully their colleagues like in *Spun Steak*, the enforcement of the Policy here was against an employee trying to keep others safe, who did not have time to police his choice of language before speaking. *See Spun Steak*, 998 F.2d at 1483. A reasonable juror could find that Defendants deprive Navajo workers of the privilege of speaking by penalizing their minor slips of the tongue.

2. Defendants cannot show a "business necessity" for their Policy because it is not compelling enough to override its discriminatory impact.

To establish that the Policy meets a business need, Defendants must show that it is "sufficiently compelling to override any discriminatory impact" and that it "effectively carr[ies] out the business purpose it is alleged to serve. *Hariss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 675 (9th Cir. 1980). In short, the "practice must be essential, the purpose compelling." *Gutierrez v. Mun. Ct. of Se. Jud. Dist., Los Angeles Cnty.*, 838 F.2d 1031, 1042 & n.15 (9th Cir. 1988), *cert. granted, judgment vacated*[5] *sub nom. Mun. Ct. of Se. Jud. Dist., Cnty. of Los Angeles v. Gutierrez*, 490 U.S. 1016 (1989).

Here, a reasonable juror could conclude that none of Defendants' asserted rationales are compelling enough to justify the Policy.

a. A reasonable juror could find that the Policy does not support workplace harmony because it does not address the actual problem of sexual harassment among Defendants' employees.

English-only policies are only necessary to create workplace harmony when evidence shows that the non-English language was used "to isolate and to intimidate members of other ethnic groups." *Long*, 894 F. Supp. at 941. The evidence must be stronger than just an employer's apprehension about the use of language the employers

[5] *Gutierrez* is a non-precedential opinion. The plaintiff in that case quit her job, so the Supreme Court vacated the decision as moot. *Garcia v. Spun Steak Co.*, 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (explaining the Supreme Court's action). Nonetheless, *Gutierrez* explains what a Ninth Circuit panel would require before finding a business need for an English-only policy. *See id.*

do not understand. *Gutierrez*, 838 F.2d at 1042. Promoting workplace harmony is not a legitimate business goal when English-only policies aggravate employee tensions. *Id.*

In *Gutierrez*, the Ninth Circuit found that promoting workplace racial harmony through an English-only policy was not a business necessity because there was no evidence that bilingual Hispanic employees were speaking Spanish to harass or exclude their non-Spanish-speaking colleagues. 838 F.2d at 1042. Instead, the court found evidence that non-Spanish-speaking employees made racially discriminatory remarks against their Hispanic coworkers. *Id.*

Defendants' desire to promote workplace harmony through the Policy is not a business necessity because there is no evidence that any employee used Navajo to "isolate and to intimidate members of other ethnic groups." *See Long*, 894 F. Supp. at 941. As in *Gutierrez*, where the employer lacked evidence of tension before instituting the policy, Defendants have presented no evidence that any Navajo employee ever used Navajo to belittle any non-Navajo employee. Miller Dec. ¶ 9; *see* 838 F.2d at 1042. The employees and customers who complained to Defendants were not concerned they were being mocked in Navajo; they were concerned that the topics of conversation were not appropriate. Miller Depo. 11:13-24. Defendants purportedly instituted the Policy because certain employees were sexually harassing their coworkers, but the harassment ended months before the Policy began in January. Miller Dec. ¶ 9; Hunt Depo. 3:23-25 (Mr. Miller talked to the offending employees in November and the sexual comments stopped). Customers and employees stopped complaining about offensive comments as well. Tsosie Dec. ¶ 5; Miller Depo. 12:13-16. Any argument that the Policy is necessary because some employees used Navajo inappropriately also falls flat because Navajo shift supervisors were present during the harassment. Miller Depo. 9:20-24.

The Policy has ultimately had the opposite of the desired effect: it has increased ethnic tensions at Burger Stop. As discussed above, the Policy punishes even minor linguistic slips into Navajo. Miller Dec. ¶ 12. Punishing such slips increases tensions because Burger Stop's 90% Navajo workforce must constantly guard against any use of

their preferred language, unduly burdening Navajo employees and not others. *See Gutierrez*, 838 F.2d at 1043; Pierce Dec. ¶ 6; Miller Dec. ¶ 5. Defendants argue that recruitment and retention is essential to their success, but they fail to mention that they have been unable to replace the employees who they fired for refusing to agree to the Policy. *Id.* at 12:5-14.

Defendants misdescribe *Long* and *Kania*. The need for workplace harmony does not justify an English-only policy when the policy is enacted to relieve a tense working environment alone, there must first be evidence that the non-English language was used to intimidate those who do not speak the language. *See Long*, 894 F. Supp. at 941; *Kania*, 14 F. Supp. 2d at 736. In *Long* and *Kania*, the employer instituted the English-only policy to address concerns about employees' use of Spanish and Polish to intimidate or exclude monolingual English speakers. *Id.* Here, there is no evidence of such uses of Navajo. All allegations of inappropriate uses of Navajo were against other Navajo speakers. Tsosie Dec. ¶ 4.

A reasonable juror could find that the Policy does not serve a business need for workplace harmony because there is no evidence it serves that purpose. Rather, the evidence points to increased harmony not after Defendants instituted the Policy but only after Mr. Miller made clear that sexual harassment was not welcome at Burger Stop. Hunt Depo. 3:23-25.

b. A reasonable juror could find that enhancing customer service is not a business necessity because customer service is not sufficiently related to employees' job performance.

Improving customer service only qualifies as a business necessity if it is "sufficiently related to [employees'] job performance." *Pacheco v. New York Presbyterian Hosp.*, 593 F. Supp. 2d 299, 622 (S.D.N.Y. 2009) (citing *EEOC v. Sephora USA,* LLC, 419 F. Supp. 2d 408, 416 (S.D.N.Y. 2005)).

In *Sephora*, a court outside the Ninth Circuit found that promoting "helpfulness, politeness, and approachability" is a legitimate business justification for an English-only

policy for sales employees "because client service is the core of Sephora's business." 419 F. Supp. 2d at 416-17; *see also Pacheco*, 593 F. Supp. 2d at 622 (where "communicating compassionately" with patients was central to the plaintiff's job). In discussing *Sephora*, Defendants omitted an important fact: the policy there did not police bilingual employees' use of just a "single word or phrase" in Spanish. *Id.* at 418.

Burger Stop's workplace is not like the customer-centered retail environment described in *Sephora*. First, the Policy here always applies to all employees, not just those who interact with customers. Miller Dec. ¶ 13. For kitchen staff, the Policy is unrelated to their job performance so cannot serve a business need. *See Pacheco*, 593 F. Supp. 2d at 622; *Sephora*, 419 F. Supp. 2d at 416-17. Second, by Defendant Miller's own account, customers at Burger Stop want "good food, and they want it fast." Miller Depo. 12:20. Customers prioritize accuracy. *Id.* at 12:20-23. Unlike in *Sephora*, where employees' approachability was "central" to their job, the key role of employees at the register is to take orders and ensure the kitchen prepares the food correctly. *Compare id.* at 12:24-13:5 *with Sephora*, 419 F. Supp. 2d at 417. Finally, unlike *Sephora*, Defendants' Policy penalizes use of even a single phrase in Navajo. Miller Dec. ¶ 16. Such a draconian rule does not serve a business need. *See Sephora*, 419 F. Supp. 2d at 418.

Defendants allege that they implemented the Policy in response to customer complaints. But they neglect to mention that the complaints were not about the use of Navajo, but were about employees "engaging in inappropriate conversations, using profane language, and making disrespectful statements and offensive comments." Miller Dec. ¶ 9. This is not like *Pacheco*, where the employer sought to prevent patient concerns about being mocked by an employee's use of Spanish. *See* 593 F. Supp. 2d at 614. Navajo-speaking customers and employees complained about employees conversing inappropriately, not about the use of Navajo. Miller Dec. ¶ 9. And the evidence shows that addressing the harassment prevented further customer complaints: Defendants received no further complaints after Sean Miller told the offending employees to stop the inappropriate behavior. Hunt Depo. 3:23-25; Tsosie Dec. ¶ 5; Miller Depo. 12:13-16.

c. A reasonable juror could find the Policy does not enable greater supervision because all of Defendants' shift managers already speak Navajo.

Supervision does not justify an English-only policy where employees are required to communicate in another language as part of their job duties. *Gutierrez*, 838 F.2d at 1043.

In *Gutierrez*, the Ninth Circuit found that there was no business need to maintain an English-only policy to enable greater supervision of bilingual employees because the employees were hired to communicate with clients in Spanish. *Gutierrez*, 838 F.2d at 1043. As a result, the policy would "in no way enable[] supervisors [to] more effectively [] evaluate or control the dissemination of information to the public." *Id.* Because the employer allowed its bilingual employees to work with Spanish-speaking clients without supervisory oversight, the court found their argument that supervisors needed to understand intra-employee communications "disingenuous at best." *Id.* The court suggested that the employer should hire more bilingual supervisors to better oversee their bilingual staff. *Id.*

The Policy does not serve a business need of allowing supervision of employees because Defendants allow Navajo employees to speak Navajo to customers who do not speak English. Pierce Dec. ¶ 8. As in *Gutierrez*, where the employer allowed and encouraged employees to speak Spanish to customers who did not speak English, supervision is not a business need here. *See* 838 F.2d at 1043. Also, three Navajo shift managers already oversee Defendants' primarily Navajo-speaking workforce. Miller Depo. 9:19-24. The shift managers are in charge during the 64 hours that the Defendants are not present, of the 84 hours the restaurant is open each week. *Id.* at 9:8-18.

Defendants' bald assertion that the Policy would prevent employees from "undermin[ing] supervision" by speaking in Navajo is belied by the fact that their existing Navajo-speaking shift supervisors failed to stop the offensive behavior. The problem is not the lack of oversight, it is the lack of *effective* oversight. The harassment that Defendants purport to be concerned about now occurred repeatedly throughout

October and November 2021. Hunt Depo. 3:3-15. In that time, Ms. Hunt's shift supervisors were present and did nothing. *Id.* at 3:16-18.

Defendants' reliance on *Gonzalez* (M.D. Fla.) and not *Gutierrez* (9th Cir.) is telling. Rather than address the more persuasive authority that sets a higher bar for the type of supervision that might justify an English-only policy, Defendants analyze only a single out-of-circuit case with little factual resemblance to this case. In *Gonzalez*, the court found a business need for an English-only policy limited to a small conference area because supervisors needed to oversee that area. *See* 1991 WL 11009376, at *3. Here, the Policy is much broader: it applies to the whole restaurant, not just one area. Miller Dec. ¶ 13. And it applies all the time, even though the Millers are present at Burger Stop less than a quarter of the time it is open. Miller Depo. 9:8-18. On this basis, a reasonable juror could find that Defendants' Policy would not address the real problem of supervisors failing to step in to prevent offensive and harassing behavior.

3. Plaintiff can also prove a less discriminatory alternative Policy to further Burger Stop's business needs.

Even if Defendants show a business need for the Policy, Plaintiffs can still succeed on their disparate impact claim by showing the "availability of an effective business alternative with less disparate racial impact" that equally serves the business purposes. *Contreras*, 656 F.2d at 1275.

In *Fitzpatrick v. City of Atlanta*, the Eleventh Circuit rejected firefighters' arguments that there were less discriminatory alternatives to the no-beard rule that disproportionately impacted Black firefighters because the firefighters could not show that any alternative would meet the city's business need for safety in firefighting equipment. 2 F.3d 1112, 1122 (11th Cir. 1993). The firefighters could not overcome the evidence that their smoke masks required a clean-shaven face for a safe seal as supported by the city's expert testimony and the OSHA, ANSI, and NIOSH safety standards. *Id.* at 1120, 1122.

Here, Defendants should institute an anti-harassment, anti-offensive-speech policy because it is less discriminatory and more effective than their English-only policy. Defendants assert that such a policy would be ineffective because they speak only English. But Defendants are present for less than a quarter of the hours the restaurant is open. Miller Depo. 9:7-18. The rest of the time, Navajo-speaking shift managers are in charge. *Id.* at 9:19-24. Though Defendants now assert that "hiring bilingual supervisors" is not a viable alternative, they already have bilingual supervisors. *Id.* Even so, an anti-harassment policy could include a provision that requires coworkers report to Defendants any inappropriate use of Navajo, which obviates the need for bilingual supervisors at all.

Instituting a policy that gives shift managers and other employees clear authority to address harassment will be more effective at curbing offensive behavior than the Policy established to accommodate the infrequent presence of the restaurant's owners. The alternative policy would also establish healthy workplace norms currently lacking. The "needs" Defendants identified really boil down to concerns over workplace harassment. Unlike *Fitzpatrick*, where the city needed firefighters' smoke masks to seal safely, Defendants' needs here simply boil down to concerns over workplace harassment. *See* 2 F.3d at 1120; Miller Depo. 11:25-12:4. An anti-harassment policy addresses the core issues at least as well as Defendants' English-only policy. Enforcing rules against harassment has already proven effective: after Ms. Hunt informed Sean Miller about the sexual comments, he talked to the offending employees and the comments stopped. Hunt Depo. 3:23-25. This alternate proposal, unlike *Fitzpatrick*, has already proven itself to meet Defendants' business needs, so a reasonable juror could find it to be a less discriminatory alternative than Defendants' English-only policy. *See* 2 F.3d at 1122.

IV. Conclusion

When Defendants forbade their Navajo employees from speaking Navajo to each other, they violated Title VII's prohibition of discrimination based on national origin. Plaintiffs can prove their case at trial, so this Court should deny Defendants' motion for summary judgment.

Respectfully submitted,

Dated: December 1, 2022

/s/ Ariel Murphy

Counsel for Plaintiff EEOC

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JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 10, 2024**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Indigenous Peoples' Journal of Law, Culture, and Resistance** **UCLA Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Pace Haub National Environmental Law Moot Court Competition**

UCLA Fall Internal Competition
UCLA Skye Donald Memorial 1L Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

McKenna, Mark
mckenna@law.ucla.edu
Horowitz, Cara
HOROWITZ@law.ucla.edu
(310) 206-4033

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Patrick Nugent (they/them)
11140 Rose Ave Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals
For the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, Vermont 05401

Re: Judicial Clerkship Application

Dear Judge Robinson:

I am a rising third-year law student at UCLA School of Law, and I am writing to apply for a position as a judicial clerk in your chambers for the 2024-2025 term or subsequent terms. I chose a career in law because I have always felt a strong calling to public service, and I hope to begin my career by serving the people of Vermont as a judicial clerk in your chambers. My partner—who fell in love with Vermont during her time at Middlebury College—and I hope to ultimately settle in the state, following in the footsteps of her friends who have returned since graduation. As such, I would love the chance to begin building relationships and contributing to the Burlington legal community in your chambers.

My experiences in both trial and appellate court settings have prepared me to be a strong contributor to your chambers and strengthened my desire to clerk at the appellate level. As an extern for Judge David O. Carter last summer, I was able to hone my legal research and writing skills by drafting opinions and orders on myriad unfamiliar areas of law. Judge Carter's clerks gave me significant independence and responsibility, and I loved both the challenge and excitement of crafting a thorough order on a tight deadline. This spring semester I also worked with the Hualapai Tribe's Court of Appeals on bench memoranda and draft opinions, gaining further legal writing experience while navigating the nuances and difficulties of tribal court practice. I particularly enjoyed the opportunity to work on challenging issues of first impression and that experience solidified my desire to clerk at the appellate level.

In addition, I have had the chance to strengthen my writing and organizational skills through journals at UCLA, evaluating legal writing as a Comments Editor on the *UCLA Law Review* and ensuring the accuracy of all citations as Managing Editor of the *Indigenous Peoples' Journal of Law, Culture, and Resistance*. My experience with moot court competitions has also allowed me to hone my writing and oral advocacy abilities. This year, I was very proud to be awarded Best Overall Brief during UCLA's fall internal competition and to be selected as a finalist in the Roscoe Pound Tournament of Champions.

Enclosed please find a copy of my resume, writing sample, and transcript, as well as letters of recommendation from Professors Cara Horowitz and Mark McKenna. Thank you for your time in considering my application, and I look forward to hearing from you.

Sincerely,

Patrick Nugent

Patrick Nugent (they/them)

11140 Rose Avenue Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

EDUCATION

UCLA School of Law, Los Angeles, California
J.D. expected May 2024 | GPA: 3.82 (top 15%)

Honors:	Masin Family Academic Excellence Gold Award – Highest scorer in Torts and Public Natural Resources Law Masin Family Academic Excellence Silver Award – Second highest scorer in Environmental Law and Policy Fall 2022 Internal Moot Court Competition – Best Overall Brief, Best Respondent
Journals:	UCLA Law Review, *Comments Editor* Indigenous Peoples' Journal of Law, Culture, and Resistance, *Managing Editor*
Moot Court:	Roscoe Pound Moot Court Tournament of Champions 2023, *Finalist* National Environmental Law Moot Court Competition, *UCLA Team Member* 1L Skye Donald Moot Court Competition, *Participant, Top 10% finisher*
Pro Bono Research:	HIV Criminalization in Maryland; California Judicial Diversity
Specializations:	David J. Epstein Program in Public Interest Law and Policy Critical Race Studies Specialization | Environmental Law Specialization

Brown University, Providence, Rhode Island
A.B., *with Honors*, Religious Studies, May 2021 | GPA: 3.88

Thesis:	*Jesus, Justice, and Jubilee: The Biblical Foundations of "Liberal" Protestant Anti-Poverty Work*

EXPERIENCE

California Attorney General - Natural Resources Law Section — Los Angeles, California
Legal Intern — Summer 2023

UCLA Tribal Legal Development Clinic — Los Angeles, California/Peach Springs, Arizona
Student Participant — Spring 2023

- Researched and drafted bench memoranda and orders in pending Hualapai Nation Court of Appeals cases
- Conferred with justices to determine the proper resolution of issues of first impression

United States District Court, Central District of California — Santa Ana, California
Judicial Extern to the Honorable David O. Carter — June 2022–August 2022

- Drafted orders on motions to dismiss, summary judgments, reconsiderations, and habeas petitions
- Prepared Judge Carter for oral arguments and drafted questions for parties

El Centro VAWA/UVISA Clinic — Los Angeles, California
Volunteer — Fall 2021–Spring 2022

- Interviewed undocumented survivors of violent crimes in Spanish and translated declarations for USCIS

Tulsa County Public Defender's Office — Tulsa, Oklahoma
Intern — June 2019–August 2019

- Reviewed police reports and cell phone logs for accuracy in pending death-penalty case

Office of Residential Life, Brown University — Providence, Rhode Island
Residential Peer Leader (RA equivalent) — August 2018–March 2020

- Oversaw two upperclassmen dormitories, once in a team and once as the sole RPL for sixty students

Brown University Softball — Providence, Rhode Island
Video Coordinator and *Manager* — February 2018–March 2020

- Travelled with the team and operated live pitch-capture software and camera equipment at all games

LANGUAGES AND INTERESTS

Fluent in Spanish, conversational in Italian, novice in Scottish Gaelic, Duolingo beginner in Irish
Enjoy songwriting, online chess, South American literature, and watching baseball and softball

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name: NUGENT, PATRICK J
UCLA ID: 905668172
Date of Birth: 03/16/XXXX
Version: 08/2014 | SAITONE
Generation Date: June 07, 2023 | 05:51:32 PM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021
SCHOOL OF LAW
Major:
LAW
Specializing in CRITICAL RACE STUDIES

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

SAW COMPLETED IN LAW 513, 23S

Previous Degrees

None Reported

California Residence Status

Resident

Fall Semester 2021

Major:
LAW

CONTRACTS	LAW 100	4.0	13.2	B+
INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
Multiple Term - In Progress				
TORTS	LAW 140	4.0	16.0	A
CIVIL PROCEDURE	LAW 145	4.0	17.2	A+

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	46.4	3.867

Spring Semester 2022

LGL RSRCH & WRITING	LAW 108B	5.0	18.5	A-
End of Multiple Term Course				
CRIMINAL LAW	LAW 120	4.0	14.8	A-
PROPERTY	LAW 130	4.0	14.8	A-
CONSTITUT LAW I	LAW 148	4.0	14.8	A-
ENVIRONMNTL JUSTICE	LAW 165	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	62.9	3.700

Fall Semester 2022

FEDERAL INDIAN LAW	LAW 267	3.0	9.9	B+
PUB NATURAL RESOURC	LAW 293	4.0	17.2	A+
ART&CULTURL PROP LW	LAW 301	3.0	0.0	P
PROB SOLV PUB INT	LAW 541	3.0	12.0	A
GEOGRPHICL INDICATN	LAW 561A	0.5	0.0	IP
Multiple Term - In Progress				
CLIMATE CHANGE	LAW 591	3.0	12.0	A

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	51.1	3.931

Spring Semester 2023

CRITCL RACE THEORY	LAW 266	4.0	13.2	B+
ENVIRONMENTAL LAW	LAW 290	4.0	16.0	A
JOURNAL LEADERSHIP	LAW 347	1.0	0.0	P
CALIF ENVIRNMNTL LW	LAW 513	3.0	12.0	A
GEOGRPHICL INDICATN	LAW 561B	1.0	0.0	P
End of Multiple Term Course				
TRIBAL LEGAL DEV	LAW 728	4.0	16.0	A

	Atm	Psd	Pts	GPA
Term Total	17.0	17.0	57.2	3.813

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	7.0	7.0	N/a	N/a
Graded Total	57.0	57.0	N/a	N/a
Cumulative Total	64.0	64.0	217.6	3.818

Total Completed Units 64.0

Memorandum

Masin Family Academic Gold Award
TORTS, s. 7, 21F
RESIDENCE ESTABLISHED 8/10/2022
Masin Family Academic Gold Award
PUB NATURAL RESOURC, s. 1, 22F
Masin Family Academic Silver Award
ENVIRONMENTAL LAW, s. 1, 23S

END OF RECORD
NO ENTRIES BELOW THIS LINE

UCLA School of Law

MARK MCKENNA
PROFESSOR OF LAW
FACULTY CO-DIRECTOR, UCLA INSTITUTE FOR TECHNOLOGY, LAW & POLICY

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 267-4117
Email: mckenna@law.ucla.edu

June 7, 2023

Re: Letter of Recommendation for Patrick Nugent

Dear Judge:

This letter is to recommend Patrick Nugent for a clerkship position in your chambers. Based on my experience with Patrick, I am certain that they will be an excellent law clerk and ultimately an outstanding lawyer. I recommend them in the strongest terms.

I first became acquainted with Patrick when they were a student in my Torts class during the fall semester of 2021. Patrick was a regular and thoughtful participant in class discussions – not only when I called on them, but also on many occasions when they volunteered and responded their classmates' comments. Patrick routinely asked questions that went to the heart of an issue and probed the purposes of the legal rules, often with the goal of connecting various topics in the class. It was very clear that his classmates saw Patrick an intellectual leader in the class. When the class got stuck on something, they often were eager to hear what Patrick thought, and they took Patrick's comments seriously in formulating their own responses.

Unsurprisingly, Patrick did very well on the final exam, earning the highest grade in strong class. In recognition of Patrick's achievement, they the Academic Excellence Gold Award for the class (given to the student with the highest grade in a curved class). Patrick's overall performance so far in law school (a cumulative GPA of 3.818) has been equally strong. While UCLA does not formally rank students, I can tell you that UCLA adheres to a grading policy that strictly limits the number of A/A+ grades that can be given in any particular course. Specifically, faculty members cannot give A or A+ grades to more than 20% of students in any first year or large upper-division course. (Here I will note that it is remarkable that Patrick has earned A+ grades in two courses. While faculty differ in their willingness to give A+ grades, I understand them to be pretty rare. I have never given a student an A+ in 20 years of teaching.) I have no doubt that Patrick's academic performance will continue the rest of their law school career.

Given Patrick's outstanding performance in my Torts class, I was delighted when they and several of their classmates registered for a small seminar that I am co-teaching over the course of this academic year. Ours is one of UCLA's Perspectives courses—courses that focus primarily on a range of perspectives

on law rather than on specific doctrinal rules. These seminars meet semi-regularly over the course of the year, and they are discussion heavy. Our class focuses on geographical indications as a way of talking about the role of place and culture in legal traditions. Here too, Patrick has been an extremely thoughtful and regular participant. Patrick has continued to play the role of intellectual leader, even while making sure to leave plenty of room for his classmates' interventions.

As you can see from Patrick's resume, they are very interested in public interest lawyering, and Patrick has already demonstrated a commitment to working in areas they are passionate about. In Patrick's first year and a half in law school, they have already volunteered with the El Centro VAWA/UVISA Clinic and participated in the UCLA Tribal Legal Development Clinic. Prior to coming to law school, Patrick interned at the Tulsa County Public Defender's Office. I know from our conversations that public interest work will always be a priority for Patrick, whether that is in a full-time position or an active pro bono practice. Patrick wants a strong clerkship opportunity in part so that they can continue to use their legal skills to the benefit of others.

I should also say that, on a personal note, I am confident that you would really enjoy working with Patrick. They are super smart, but also humble and very well-rounded. Those traits will serve Patrick well as a clerk and as a lawyer. I strongly recommend them. If you have any questions, please do not hesitate to contact me at (310) 267-4117 or at mckenna@law.ucla.edu.

Sincerely,

Mark McKenna
Faculty Co-Director, UCLA Institute of Technology, Law & Policy

UNIVERSITY OF CALIFORNIA, LOS ANGELES **UCLA**

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

Cara Horowitz
Andrew Sabin Family Foundation Co-Executive Director
Emmett Institute on Climate Change and the Environment

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-4033
Email: horowitz@law.ucla.edu

February 28, 2023

To whom it may concern:

It is my great pleasure to give Patrick Nugent my strongest recommendation for a judicial clerkship. Patrick is a gifted researcher, writer, and legal thinker. In addition, Patrick is collaborative, unafraid of complexity, and a hard worker. They would be an asset to any chambers.

Patrick was a student in my climate law and policy seminar, an advanced discussion course that covers a broad swath of U.S. and international law and policy approaches to the problem of climate change. Their contributions in class demonstrated a strong grasp of the material and a genuine interest in engaging with new ideas and understanding complex issues. Patrick wrote three short papers for the class, including an especially strong one on potential litigation approaches to addressing the problem of "greenwashing," by which corporations deceive consumers through advertising that unduly bolsters eco credentials. Patrick's research and writing were outstanding; they were among the very strongest students in the class and received an "A". I am not at all surprised to learn that Patrick earned the highest grade in not one but two of their large, curved lecture classes.

Patrick has also contributed significantly to the law school community. They serve as an editor of two journals, including the UCLA Law Review, and also regularly participate in moot court competitions. ("Participate in" undersells Patrick's contributions, actually; I understand that they won Best Overall Brief and Best Respondent in our UCLA moot court competition.) They have volunteered to assist undocumented crime victims and to advance research into HIV criminalization.

I also want to say a word about Patrick's empathy and collegiality. I supervised Patrick and a classmate in a national moot court environmental competition earlier this year, for which Patrick and the teammate submitted an excellent brief. However, a couple of weeks before the team could participate in the oral argument portion of the competition, Patrick's teammate had to pull out for personal reasons, leaving Patrick no choice but also to withdraw. It was undoubtedly a disappointment to Patrick, who had worked hard to prepare and who would, I suspect, have done extremely well in the oral advocacy rounds. I know Patrick had been looking forward to the oral advocacy. But Patrick showed nothing but immediate support and understanding of the teammate's decision, easing (I'm sure) the teammate's considerable stress that week.

This is typical of my experiences with Patrick, who has shown maturity, generosity, and good grace in every interaction we've had. As we all know, such characteristics do not always come hand in hand with top-notch legal acumen; here, they do.

For all of these reasons, I give Patrick my highest recommendation. Please feel free to contact me if any additional information might be useful.

Sincerely,

Cara A. Horowitz

Patrick Nugent (they/them)
11140 Rose Avenue Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

I prepared the following excerpted brief as part of UCLA's team for the 2023 Jeffrey G. Miller National Environmental Law Moot Court Competition. The competition problem consisted of four questions arising from a three-party suit under the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA. My partner and I, representing the EPA, chose two questions each and drafted our sections independently of each other. The questions presented in my portion were:

1. Did the District Court err when it determined that costs incurred by FAWS in sampling, testing, and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA?
2. Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

I drafted the initial statement of the case with relevant facts before my partner supplemented the section with additional facts pertaining to his issues: ARARS under CERCLA and EPA's decision to order additional remediation after reopening a consent decree. Having removed his arguments and facts, the condensed version below represents entirely my own work with no edits or feedback from anyone else.

Statement of the Case

I. NAS-T Contamination and the BELCO Action

Between 1973 and 1998, Appellant Better Living Corporation ("BELCO") manufactured Nitro-Acetate Titanium ("NAS-T") at a factory (the "Facility") in the town of Centerburg in the state of New Union. Record at 4-5. BELCO produced NAS-T as part of its production of LockSeal, a sealant patented by BELCO and manufactured by combining NAS-T with an activation agent. *Id.* Experts identified NAS-T as a probable human carcinogen in the 1980's and the Environmental Protection Agency ("EPA") used various studies to establish a Health Advisory Level ("HAL") of 10 parts per billion ("ppb") below which NAS-T is non-toxic to humans in drinking water. *Id.* at 6. EPA developed this HAL using a "significant margin of error" to safeguard human health, and NAS-T is not detectable by smell below 5 ppb. *Id.*

In January 2015, following reports of sour smelling water, the Centerburg County Department of Health ("DOH") conducted testing in the publicly owned and treated Centerburg Water Supply ("CWS"). *Id.* at 5-6. Following test results between 45 and 60 ppb, DOH advised Centerburg residents to stop drinking tap water in September 2015 and BELCO began supplying bottled water to residents. *Id.* at 6. New Union referred the matter to EPA in January 2016. *Id.*

Under EPA direction, BELCO investigated the contamination and discovered a plume of NAS-T in the Sandstone Aquifer—which feeds the CWS—caused by spills and an unlined lagoon at the Facility. *Id.* As part of this investigation, BELCO installed three lines of soil monitoring wells progressively further south and downgradient within the Sandstone Aquifer. *Id.* at 7. Finding that a line of wells installed 1.5 miles south of Centerburg returned no detectable amounts of NAS-T, EPA required no further wells be installed. *Id.* This last line of wells is a half mile north of Fartown, a community of 500 that is downgradient from Centerburg and whose residents also receive water from the Sandstone Aquifer via private wells. *Id.* at 5, 7.

BELCO's remedial investigation and feasibility study ("RI/FS") recommended excavation of soils at the Facility and filtration of the CWS. *Id.* at 6-7. After considering the RI/FS findings and public comments, EPA selected a cleanup plan for the Facility. *Id.* On June 30, 2017, EPA sued BELCO in Case No. 17-CV-1234 (the "BELCO Action"), and shortly thereafter entered a Consent Decree (the "CD") adopting a cleanup based on the RI/FS and requiring ongoing soil monitoring. *Id.* The district court approved the CD on August 28, 2017, and no citizens of Fartown or Centerburg objected at any point in the process. *Id.*

II. The Environmental Rights Amendment

In November 2020, New Union added the Environmental Rights Amendment ("ERA") to its Constitution. *Id.* The ERA states: "Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. Const. art. I, § 7. During debate on its passage, the amendment's sponsor characterized the ERA as a gap-filling law that allows for action on contamination from otherwise unregulated substances that "cause some type of harm." Addendum at 6. However, the sponsor was careful to note that "clean water" means "nonharmful," rather than free of *any* substances, given the beneficial additives also present in water. *Id.* at 4-5. He specifically stressed that, under the ERA, "clean" refers to water that will "not do injury" to those who consume it. *Id.* Additionally, when presented with a hypothetical regarding offensive smells from "trash trains," the sponsor indicated that the right to be free of offensive smells already exists in New Union and would not be affected by the ERA. *Id.* at 5-6.

III. FAWS' Intervention

The monitoring wells that BELCO installed closest to Fartown returned consistent nondetects after their placement in late 2016 and early 2017, with the only exception being

detects of 5 and 6 ppb in January 2018—around half the HAL of 10 ppb. Record at 8. In February 2019, at the request of Fartown residents, DOH tested five wells in Fartown and detected no NAS-T. *Id.* Nevertheless, several residents requested EPA perform similar testing in May 2019. *Id.* Given the lengthy record of consistent nondetects, EPA declined. *Id.*

Following that refusal, in December 2019, 100 residents formed Fartown Association for Water Safety ("FAWS") and paid $21,500 to conduct their own testing and analysis of drinking water wells. *Id.* After taking 3 samples from each of 75 wells, that testing returned 120 nondetects, 51 results below 5 ppb, and 54 results between 5 and 8 ppb. *Id.* As of July 2021, no wells have ever tested above 8 ppb. *Id.* at 10. FAWS brought its self-initiated test results to EPA in May 2020 and requested the CD be reopened. *Id.* at 8. EPA again declined because the detections of NAS-T were so low and the reopener provisions of the CD so narrow. *Id.*

FAWS moved to intervene in the BELCO action and filed a separate suit—21-CV-1776 (the "FAWS Action")—against BELCO in August 2017, more than six years after DOH testing began in Centerburg. *Id.* at 10. The district court granted the motion to intervene on September 24, 2021, and consolidated the cases. *Id.* Discovery on all CERCLA claims finished on December 30, 2021, the parties moved and cross-moved for summary judgment on those claims, and FAWS moved to dismiss its remaining state law claims once the federal claims were resolved. *Id.* The district court entered judgment for BELCO on FAWS' claim for testing costs and exercised its discretion to retain jurisdiction over FAWS' remaining state law claims. *Id.*

Argument

I. BELCO Is Not Liable for FAWS' Testing Costs Because Those Costs Were Unauthorized and Duplicative of EPA's Previous Investigation When They Were Incurred, Rendering Them Unnecessary Under CERCLA

After years of consistent nondetects in the wells closest to Fartown, further nondetects in DOH's tests of Fartown wells, and EPA's repeated decisions not to conduct additional testing,

FAWS nevertheless contracted for its own expensive sampling of 75 wells in Fartown. Now, FAWS requests that BELCO be held responsible for those costs under CERCLA. As the district court correctly found, those costs were incurred while FAWS was not involved in the cleanup and was not authorized to duplicate EPA's prior investigations. Therefore, its costs were unnecessary and not recoverable under CERCLA.

To recover response costs under CERCLA, a plaintiff must establish that (1) the site in question is a "facility" as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release. 42 U.S.C. § 9607(a); *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). The plaintiff must also show that costs incurred are "necessary" and "consistent with the national contingency plan." *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005). The parties' only dispute here is whether FAWS' costs were necessary.

To be necessary, costs must be closely tied to an actual cleanup so that one party cannot unilaterally dump the costs of its unrelated actions onto another. *Id.* When an otherwise uninvolved third party incurs investigation costs in anticipation of litigation enforcing responsibilities under a consent decree, those costs are not closely tied to an actual cleanup and are not recoverable. *See Wilson Road Dev. Corp. v. Fronabarger Concreters, Inc.*, 209 F. Supp. 3d 1093, 1115-16 (E.D. Mo. 2016). Additionally, "'investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by the EPA' are not considered necessary because they are 'duplicative' of the work performed by EPA." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997) (quoting *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal.

1993)) (string citations omitted). Once a party has notice that EPA is investigating and has not authorized additional investigations, any investigative costs incurred by that party are not recoverable. *Louisiana-Pacific*, 811 F. Supp. at 1425-26; *see also Krygoski Const. Co. v. City of Menominee*, 431 F. Supp. 2d 755, 766 (W.D. Mich. 2006) (finding costs unnecessary when plaintiff "did not undertake its testing and sampling activities pursuant to any government order" and the government "never ordered Krygoski to do anything" amid ongoing EPA remediation). It is immaterial whether the investigating party acted reasonably or in good faith, and the fact that EPA later requests and uses data from a duplicative investigation does not retroactively make that investigation necessary. *Louisiana-Pacific*, 811 F. Supp. at 1425; *Iron Mountain Mines*, 987 F. Supp. at 1272. As a question of fact, a determination that certain costs were unnecessary is reviewed for clear error. *United States v. Hardage*, 982 F.2d 1436, 1447-48 (10th Cir. 1992).

Here, FAWS incurred the costs at issue after BELCO had already conducted its RI/FS investigation and EPA had deemed existing monitoring sufficient—all while FAWS was uninvolved in the cleanup. There was no existing cleanup underway in Fartown and BELCO had been conducting monthly testing under EPA's direction for well over two years. In that time, the line of wells closest to Fartown had returned no detectable NAS-T save for two detections well below the HAL in January 2018—nearly two years before FAWS' sampling took place. As such, EPA consciously chose to conduct no further investigation and there was no existing cleanup in Fartown at the time. Additionally, no residents of Fartown objected to the RI/FS or CD while those processes were ongoing despite the opportunity for public comment.

Notwithstanding the consistent nondetects, DOH agreed to test five Fartown wells in February 2019 and again found no detectable NAS-T. Forging ahead despite this evidence that further investigation was unnecessary, Fartown residents asked EPA to order tests on Fartown's

wells in May 2019. EPA declined citing the repeated nondetects. Thus, from that moment, the Fartown residents explicitly knew that any investigation was both unauthorized by EPA and surplus to existing monitoring. They continued undeterred in anticipation of the instant litigation.

In December 2019, residents formed FAWS and retained Central Laboratories, Inc. to test wells in Fartown for NAS-T at a cost of $21,500. Though over half of the results returned nondetects and none of the samples returned a NAS-T concentration at or above the HAL, FAWS again asked EPA to order further investigations. Reasoning in part that the low levels of NAS-T did not warrant such an investigation, EPA once again declined. FAWS then intervened in the BELCO Action and brought suit separately to recover the costs of its investigations.

The fact that FAWS was not involved in the remediation efforts at the time of the sampling forecloses its ability to recover under CERCLA. Its investigation was not only not "closely tied" to the existing cleanup but undertaken completely separately. *Young*, 394 F.3d at 863. FAWS began testing after EPA declined to do so multiple times, with a clear end goal of bringing litigation against BELCO for additional remediation. Costs incurred in an attempt to compel action under an EPA-ordered consent decree are unnecessary if the party incurring them has been uninvolved in the remediation efforts. *See Wilson*, 209 F. Supp. 3d at 1116. No residents of Fartown objected to the CD when it was entered, nor were any of them parties to the BELCO Action. As such, while FAWS may be involved in the cleanup now, the situation *at the time* of sampling necessitates a finding that testing costs were unnecessary and unrecoverable.

FAWS argues that these costs were necessary because the sampling returned detectable amounts of NAS-T, but this misconstrues the law. Like the investigation in *Louisiana-Pacific*, FAWS' well sampling occurred *after* it knew EPA was investigating through the monitoring wells included in the CD, necessarily making any other investigation duplicative. As in *Krygoski*,

"the government never ordered [FAWS] to do anything," barring recovery for FAWS' investigation, regardless of its results. *Krygoski*, 431 F. Supp. 2d at 766. Additionally, as the district court explained, the fact that the testing returned some low levels of NAS-T and was later used by EPA does not affect the determination that costs were necessary *at the time* they were incurred. *See Iron Mountain Mines*, 987 F. Supp. at 1272. Allowing FAWS to recover its costs opens the door to double recoveries for *any* uninvolved party that undertakes unauthorized testing. Such a result would frustrate the spirit of CERCLA and undermine its directive that remediation be "cost-effective." *Louisiana-Pacific*, 811 F. Supp. at 1425

In sum, the district court correctly identified that the dispositive issue with respect to FAWS' testing costs is that they were not necessary *when they were incurred*. FAWS was neither part of EPA's existing monitoring and remediation efforts under the CD nor authorized to conduct its own investigation. Therefore, FAWS cannot foist the costs of its unsanctioned and duplicative investigation onto BELCO after the fact. It was not clear error for the district court to deny recovery of FAWS' unnecessary costs and this Court must affirm.

II. The District Court Did Not Abuse Its Discretion in Retaining Jurisdiction Over FAWS State Law Claims Because the Court Has Invested Significant Time and Effort into the Case and Those Claims Presented No Novel Issues of State Law

Having resolved all federal claims, the district court then exercised its discretion under 28 U.S.C. § 1367 to retain jurisdiction over FAWS' state law negligence and nuisance claims against BELCO. Because of the years of time and effort already expended by the district court, the potential for proceedings inconsistent with the CD, and the fact that negligence and nuisance present no novel issues of state law, the district court opted not to dismiss the state claims. Courts review a decision to retain jurisdiction over state law claims for abuse of discretion. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 738 (11th Cir. 2006).

Federal courts can hear state law claims that "are so related" to the federal claims at issue that the two constitute "the same case or controversy." 28 U.S.C. § 1367(a). This pendent jurisdiction can exist even when all federal claims have been resolved, and courts weigh *Gibbs* factors of "judicial economy, convenience, fairness, and comity" when deciding whether to retain jurisdiction over related state claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (citing *United Mineworkers of Am. v. Gibbs*, 383 U.S. 715, 726-27 (1966)).

While courts will normally decline to retain state law claims following the resolution of the related federal claims, that decision "is neither absolute nor automatic." *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 307 (5th Cir. 1991). Instead, "district courts 'enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished.'" *Hall v. Greystar Mgmt. Servs. LP*, 179 F. Supp. 3d 534, 536 (D. Md. 2016) (quoting *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995)). In fact, when none of the *Gibbs* factors of judicial economy, convenience, fairness, and comity weigh against retention, it can be an abuse of discretion *not* to retain the state claims. *Newport*, 941 F.2d at 308.

Additionally, while federal courts avoid retaining jurisdiction over cases that present novel or complex issues of state law, "generally, state tort claims are not considered novel or complex." *Parker*, 468 F.3d at 743. Given the overlap common between federal environmental laws and state nuisance actions, plaintiffs such as FAWS "would ordinarily be expected to try them all in one proceeding." *Id.* at 747.

In the case at bar, the district court properly determined that the *Gibbs* factors weighed in favor of retaining jurisdiction and that FAWS' claims did not present novel issues of state law. The district court has already invested years into the BELCO action, approved and then reopened the CD related to NAS-T contamination, and completed significant discovery before deciding the

motions and cross-motions for summary judgment. Because FAWS' only remaining claims are straightforward nuisance and negligence claims arising from facts familiar to the district court, it was not an abuse of discretion to retain jurisdiction over those claims.

In *Hall*, the court exercised its discretion to retain state law claims, despite the fact that discovery had not begun and no trial date was set, because the court had already had the case for more than two years and was "intimately familiar" with the controversy. *Hall*, 179 F. Supp. 3d at 537. Similarly, in *Parker*, the Eleventh Circuit reversed a district court's discretionary decision *not* to retain jurisdiction over nuisance and negligence claims in a CERCLA action, citing the "substantial judicial resources" already committed to a four-year case. *Parker*, 468 F.3d at 746.

Here, the district court has already been involved in BELCO's cleanup of the Facility for four and a half years and completed discovery on all CERCLA claims. The court also solicited public comment on the CD, approved it, and has now reopened it—which will likely require further proceedings and judicial monitoring. Though FAWS argues that further discovery is needed on its state law claims, that does not negate the "tremendous amount of work" already completed by the district court, including significant overlapping discovery. Record at 15. Additionally, FAWS' request that the court order BELCO to install Cleanstripping on wells detecting NAS-T—an issue implicated in this Court's ultimate decisions on the CD and EPA's administrative actions—could potentially lead to a state court ordering actions inconsistent with the provisions of the CD if tried separately. Noting these concerns, in the interest of avoiding duplicative proceedings and maintaining fairness to BELCO and EPA, the district court exercised its discretionary authority to retain jurisdiction over FAWS' state law claims.

FAWS' last argument—that the ERA renders its tort claims inherently novel—is not supported by the case law or the ERA itself. First, as discussed above, state torts related to

CERCLA claims are not novel and should be tried together. *Parker*, 468 F.3d at 473, 476. Further, the ERA does not materially affect the outcome of FAWS' tort claims. Because of the nonexistent or minimal NAS-T detected in Fartown's wells, FAWS' claims involve nonharmful contamination with no consequences beyond a sour smell. As such, FAWS' rights are unchanged by the ERA, and its passage will have no effect on the outcome of FAWS' tort claims.

The sponsor of the ERA defined clean water as water that would "not do injury" while explicitly disclaiming that clean water meant H2O free of any other substances. Asked about the implications of the ERA on foul smells, the sponsor explained that the right to seek redress for such an issue already exists in New Union. The ERA thus does nothing to change the analysis in a straightforward tort case involving nonharmful water or unpleasant smells. No wells in Fartown have tested above 8 ppb, below the HAL danger level, meaning that the only consequence in Fartown is a sour smell. Accordingly, the ERA does not affect FAWS' ability to seek redress under state law and its passage does not magically create a novel issue. The district court is therefore more than competent to adjudicate FAWS' nuisance and negligence claims.

Given that such substantial time, effort, and investment has gone into—and will continue to go into—the BELCO Action, and that FAWS' tort claims present no novel or complex issues of state law despite the passage of the ERA, the district court did not abuse its discretion in retaining jurisdiction over the remaining state law claims. This Court should accordingly affirm.

Conclusion

For the foregoing reasons, this Court should affirm the district court's determination that BELCO is not liable for FAWS' testing and sampling costs and find that the district court's decision to retain jurisdiction over FAWS' state law claims was not an abuse of discretion.

Applicant Details

First Name	**Virginia**
Last Name	**Oat**
Citizenship Status	**U. S. Citizen**
Email Address	**vno5wb@virginia.edu**
Address	**Address** **Street** **1440 Columbia Road NW** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20009**
Contact Phone Number	**9178334064**

Applicant Education

BA/BS From	**Tufts University**
Date of BA/BS	**May 2015**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 20, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William Minor Lile Moot Court Competition, Finalist** **Extramural Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Ballenger, Scott
sballenger@law.virginia.edu
(434) 924-7582

Coughlin, Anne
acoughlin@law.virginia.edu
434-243-0392

AliKhan, Loren
LAliKhan@dcappeals.gov
202-879-5529

Schwartzman, Micah
schwartzman@law.virginia.edu
434-924-7848

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Virginia (Nina) Oat

409 1st Street SW, Apt. 406, Roanoke, VA 24011 • (917) 833-4064 • vno5wb@virginia.edu

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson,

I am a graduate of the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am currently clerking for Chief Judge Michael Urbanski on the United States District Court for the Western District of Virginia. Last term, I clerked for Judge Loren AliKhan on the District of Columbia Court of Appeals. I am eager to return to New England and hope to practice in the area long term.

My work experience has required me to quickly become adept with new areas of the law, a skill which will make me an especially effective clerk. At O'Melveny & Myers and during my clerkships, I have worked on a wide variety of matters ranging from employment discrimination and prisoner rights to state sovereign immunity and Medicare compliance. This skill will translate well to a clerkship that constantly requires engaging with different areas of law. Also, my work experience has shown me how vital it is to actively participate in fostering a positive work environment. My mentors are mostly women in appellate law, which has naturally contributed to my interest in the work. But I value these mentors so highly because they model not only the sort of law I want to practice, but the sort of attorney I want to be—dedicated, enthusiastic, efficient, and unfailingly kind. I will bring these priorities as a clerk in your chambers.

Enclosed please find a copy of my resume, writing sample, and transcript. If you have any questions or need to contact me for any reason, please do not hesitate to reach me at my above contact information.

Respectfully,

Nina Oat

Virginia (Nina) Oat

409 1st Street SW, Apt. 406, Roanoke, VA 24011 • (917) 833-4064 • vno5wb@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., May 2021
- *Virginia Law Review*, Executive Editor
- William Minor Lile Moot Court Competition, Finalist & James M. Shoemaker Jr. Award Winner
- Best Oral Argument Award, 1L Legal Research and Writing Program, Section D
- Wavelength Grant Recipient, Serpentine Society (tuition aid from UVA LGBTQ+ alumni association)
- Lambda Legal, Pro Bono Volunteer, January 2019
- American Constitution Society, Virginia Law Chapter, Director of Programming
- Peer Advisor

Tufts University, Somerville, MA
B.A., Community Health and Psychology, *magna cum laude*, May 2015
- American Civil Liberties Union, Tufts University Chapter, Founder and Co-President
- Varsity Track and Field, 2011 – 2013

EXPERIENCE

The Honorable Michael F. Urbanski, U.S. District Court for the Western District of Virginia
Law Clerk, September 2022 – current

The Honorable Loren L. AliKhan, District of Columbia Court of Appeals
Law Clerk, February 2022 – September 2022

O'Melveny & Myers, Washington, D.C.
Associate, October 2021 – February 2022
- Co-authored petition for certiorari in *Cole v. United States* (U.S. 21-1165)
- Co-authored *amicus* briefs in *Ruan v. United States* (U.S. 20-1410) & *Torres v. Texas Department of Public Safety* (U.S. 20-603)

Summer Associate, July – August 2020
- Analyzed petitions for *en banc* rehearing of motions to intervene filed by state governments
- Researched and wrote memoranda analyzing evidentiary issues in cybersecurity investigations

Appellate Litigation Clinic, University of Virginia School of Law, Charlottesville, VA
Student Advocate, August 2020 – May 2021
- Successfully co-argued before U.S. Court of Appeals for the Fourth Circuit in *Dean v. Jones*, 984 F.3d 295 (4th Cir. 2021)
- Successfully co-briefed and argued before U.S. Court of Appeals for the Third Circuit in *Zamichieli v. Pennsylvania Department of Corrections*, 19-3305, 2022 WL 777201 (March 14, 2022)

Office of the Solicitor General for the District of Columbia, Washington, D.C.
Intern, May – July 2019
- Co-drafted multistate *amicus* brief in federal opioids suit
- Researched and wrote memoranda analyzing parental rights under D.C. child protection laws

Constitutional Accountability Center, Washington, D.C.
Research and Administrative Associate, July 2016 – July 2018
- Assisted with Foreign Emoluments Clause litigation on behalf of over 200 members of Congress
- Researched constitutional history and federal judicial nominations

Rose, Chinitz & Rose, Boston, MA
Paralegal, July 2015 – July 2016
- Reviewed and edited legal memoranda and case filings in state and federal court

INTERESTS

Distance running, learning American Sign Language (ASL), women-authored fiction

BAR ADMISSION: District of Columbia, 2021

Virginia (Nina) Oat

1440 Columbia Road NW, Apt. 101, Washington, DC 20009 • (917) 833-4064 • vno5wb@virginia.edu

Transcript Addendum

1. During my first year of law school, I had an undiagnosed medical condition that substantially interfered with my academic performance. It has since been diagnosed and treated, and it no longer affects my ability to work.

2. The University of Virginia School of Law imposed a mandatory Credit/No Credit grading policy during the Spring 2020 semester due to COVID-19.

Virginia Newhall Oat

06/08/2021

Beginning of Law Record

2018 Fall

School:		School of Law		
Major:		Law		
LAW	6000	Civil Procedure	B+	4.0
LAW	6002	Contracts	B	4.0
LAW	6003	Criminal Law	B+	3.0
LAW	6004	Legal Research and Writing I	S	1.0
LAW	6007	Torts	B+	4.0

2019 Spring

School:		School of Law		
Major:		Law		
LAW	6001	Constitutional Law	B+	4.0
LAW	6005	Lgl Research & Writing II (YR)	S	2.0
LAW	6006	Property	B	4.0
LAW	6104	Evidence	B	4.0
LAW	7019	Criminal Investigation	A-	3.0

2019 Fall

School:		School of Law		
Major:		Law		
LAW	7005	Antitrust	B+	3.0
LAW	7017	Con Law II: Religious Liberty	A-	3.0
LAW	7764	Understng Police Use Frce (SC)	A-	1.0
LAW	8004	Con Law II: Speech and Press	B+	3.0
LAW	9081	Trial Advocacy	A-	3.0

2020 Spring

School:		School of Law		
Major:		Law		
LAW	6102	Administrative Law	CR	4.0
LAW	7071	Professional Responsibility	CR	2.0
LAW	7123	Class Actions/Aggregate Litgtn	CR	3.0
LAW	8003	Civil Rights Litigation	CR	3.0
LAW	9241	Death Penalty	CR	3.0

2020 Fall

School:		School of Law		
Major:		Law		
LAW	6105	Federal Courts	A-	4.0
LAW	7090	Regulatn of Political Process	B+	3.0
LAW	8602	Appellate Litigatn Clinic (YR)	CR	4.0
LAW	9062	Supreme Crt Warren to Roberts	A	3.0
LAW	9089	Seminar in Ethical Values (YR)	YR	0.0

2021 Spring

School:		School of Law		
Major:		Law		
LAW	7062	Legislation	A-	4.0
LAW	8603	Appellate Litigatn Clinic (YR)	A-	4.0
LAW	9090	Seminar in Ethical Values (YR)	CR	1.0
LAW	9240	Con Law II: Poverty	A-	3.0

End of Law School Record

J. Scott Ballenger
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

May 25, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to enthusiastically recommend one of my favorite students, Virginia (Nina) Oat, who I understand has applied for a clerkship in your chambers. Nina is extremely bright, a terrific person and colleague, and a rare talent as an advocate. If I was still out in the real world and could hire any of my students next year, it would be Nina. I am confident that you would have a great experience with her, and that you would be very proud to be associated with her in the years to come.

I am relatively new to teaching, after 20 years of practice in the Supreme Court and Appellate group at Latham & Watkins in DC and before that clerkships with Justice Scalia and Cliff Wallace on the 9th Circuit. I first met Nina two years ago, in a bunch of different contexts. She enrolled in my Class Actions class, I had some interactions with her in her job on the managing board of the Virginia Law Review, and I was randomly assigned as a judge for her side of the quarter-final round in our premiere moot court competition. And last school year she was been one of the 12 students in a full-year appellate litigation clinic that I supervise.

Nina was a great student in Class Actions. She was consistently one of the two or three most engaged students (out of about 60) in our class sessions, always had interesting insights into the cases, and did really well on the exam--which, unfortunately for her, I had to grade pass/fail because of the covid emergency. When I drew her team as a judge in the moot court quarterfinals midway through the semester, I expected just based on my classroom experience that she would be good, but I was fairly well amazed. I started out aggressive with the questioning, and when she didn't flinch kept ratcheting it up to try and brush her back enough that we could move on to another topic. It didn't work. She never backed off, analytically or emotionally, and kept control of the conversation until her time was up. She was by far the best of the 8 advocates we saw that night, and I'm told was also the best in the semifinal round later in the school year.

We only have space in the appellate clinic for 12 students a year, and the spots are traditionally filled by lottery because demand greatly exceeds supply. I was tempted to break that tradition just to be sure that Nina would be in the class, and was very relieved and happy when she ended up on the right side of the lottery. Over the summer the Fourth Circuit scheduled argument in one of our cases from the prior year for the first week of classes. Of course, Nina was the first to volunteer for it. We try to split our argument opportunities so that more students can have the experience, and Nina graciously deferred the opening argument to a classmate who is deaf and thought that it would be easier to prepare her ASL interpreter for an opening than a rebuttal. They both did a great job, and won the case (a remarkable published opinion, Dean v. Jones, 984 F.3d 295 (4th Cir. 2021)), but Nina's rebuttal was exceptional and made me hope I could engineer a rare second argument for her this year just because I wanted to see her in action again. As it turned out I could--she just argued Zamichieli v. Pennsylvania Department of Corrections, No. 19-3305 in the Third Circuit.

I spent the middle, best part of my career in private practice as chief lieutenant and gal Friday to Maureen Mahoney, who I think was rivaled only by John Roberts as an advocate in that period. In her tenaciousness and command of a room Nina reminds me of Maureen, and I don't say that lightly. I never saw a young lawyer in private practice who was as polished and solid on her feet as Nina is, anywhere near this stage in her career--and that includes several Supreme Court clerks who later went on to serve stints in the Solicitor General's Office. She is incisive and confident and unafraid, already a terrific advocate on her way to becoming a great one I think.

She's also very smart, writes clearly and well, and works very hard. In addition to First Amendment retaliation claims, the Zamichieli case involves injuries a prisoner sustained when falling down the stairs from an upper-tier cell, when he had a medical order that he should have been on a lower tier due to a seizure disorder. The district court dismissed the case on administrative exhaustion grounds because he did not file a grievance about his cell placement until after the fall. Nina took on the hardest part of the case, the core exhaustion issue, and constructed a very lucid and compelling argument that the court had just misconceptualized what PLRA exhaustion is all about. There really were very few helpful guideposts in the case law, so it was a tricky and very creative bit of advocacy. Nina also took total ownership of the case, pushed her teammates to stay on track, and just quietly finished everything they forgot to do. She volunteers for everything that needs to get done. She volunteered to argue a case in the Fourth Circuit during spring exams, and was spared that challenge only because argument was scheduled in Zamichieli the week before exams. Our clinic was pretty close to a full time job for Nina I think--and she did it all while taking a full course load, serving on the managing board of the Virginia Law Review (as executive editor), and competing in the Lile moot court competition all the way to the finals. When I was a student here they didn't even let you apply for the law review managing board if you were still in moot court; the conventional wisdom was that it was too much work to do both.

Nina's grades here were good but not, I think, nearly as good as her talent would predict. She's just one of the many extremely

bright people who don't have a particular affinity for the law school exam format. (For what it's worth, the A- I gave her in my clinic was the highest grade I gave, and I wish it could have been an A. That's what her performance deserved, but the B+ mean we enforce in every class and the fact that none of her classmates deserved a genuinely poor grade made it impossible. If I could have given one "A" it would have been to Nina). She already has a clerkship lined up with Judge Urbanski on the Western District of Virginia, but I know she would love to find another opportunity after that and I think she will make someone a great law clerk. I also am very confident that you will like her, a lot, if you meet her. Nina was very popular with her classmates here, and has lots of fans on the faculty too. She would create a warm and happy environment in chambers, while setting a quiet but ferocious example for the other clerks with her work ethic. If you don't hire her, I will be trying hard to recruit her away from O'Melveny & Myers to my old firm.

Please feel free to call or email if you have any questions.

Best Regards,

J. Scott Ballenger

Scott Ballenger - sballenger@law.virginia.edu - (434) 924-7582

June 02, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

Nina Oat has advised me that she is applying for a clerkship in your Chambers. I am delighted to offer this letter on her behalf. I know Nina well, and I recommend her to you with confidence and enthusiasm. She is super-smart, she writes like an angel, she is mature and professional, and she is resilient. I predict that you and your staff will enjoy – and benefit mightily – from her presence in Chambers.

When you take a look at Nina's resume and transcript, you will see that she possesses all of the credentials that are owned by the very best in our business. Before arriving on our grounds, she had a distinguished career as an undergraduate at Tufts University, she worked for a year as a paralegal at a fine law firm in Boston, and she spent two years as a research associate at the Constitutional Accountability Center in Washington, D.C. Here, at UVA Law School, she earned strong grades in all of her courses, she was Executive Editor on the Managing Board of the Virginia Law Review, she coached our Extramural Moot Court Team, and she served as a Peer Advisor for first-year students. And, yes, that is just for starters! To say the least, she was a highly visible leader in our community, just as she will be in our profession, as these credentials powerfully testify.

But paper credentials never tell the whole story. That is emphatically true in Nina's case, for I have found the quality of Nina's intellect and character to be even finer than the academic and professional achievements that she has amassed. During her first semester here, Nina was enrolled in my Criminal Law course, and, happily for me, she signed up to take my Criminal Investigation course during her second term. In the classroom, she was an absolute star, a dream student, one whose hard work and engaged presence contribute to the success of the endeavor as a whole. She is intellectually curious, passionate about ideas, fair-minded, and non-defensive. She is quick to give credit to the contributions made by others, and she is clear-eyed about the real-world consequences of classroom work to which many students are inattentive. These latter traits are especially important, for they suggest that Nina will not hesitate to take responsibility for the quality of her work or to share the credit with her colleagues and assistants.

It has been a joy and an honor for me to watch Nina come into her own. She put in a strong performance during her first semester, but she was a bit disappointed in those early grades. She confided in me that her initial inclination was to be defensive, so that, at first, she hesitated to ask for and implement constructive advice. She quickly overcame that inclination, she spoke to me and to other professors about how she could improve her performance, and she developed a successful strategy for moving ever upward, as well as ahead. This experience shows that she is as resilient as she is brilliant, that she will be the kind of colleague who will respond to criticism with her head and not with her ego, that she understands that what matters is not that she is "right" but that the work is well-done. If you resemble the judges for whom I clerked, those are the precise characteristics that are the hallmark of law-clerkly excellence!

I asked Nina why she was able to approach her professional development with this healthy mixture of tenacity, balance, and open-mindedness. As it turns out, she learned these lessons from her father, who is one of her personal heroes. Nina's parents divorced when she was a young child, and, because her father has an intellectual disability, her mother's lawyers were able to portray him as less fit for custody, even though her mother was neglectful and, alas, even abusive. But Nina's father kept stepping up, loving and supporting her, and working to regain custody. The proceedings were protracted and ugly, but, eventually, he succeeded in changing the judge's mind about the custody arrangement. Because her father refused to leave her side, Nina learned that it is possible to achieve justice when we nurture a resilient spirit, a mind that is alert to alternative outcomes, and an imagination capacious enough to recognize excellence in its manifold forms. As I write these words, I realize that this conversation is among the most powerful that I have ever had with a student. To say the least, Nina has good judgment in her choice of heroes, as she articulated perfectly the precious values that her father instilled in her. For all these reasons, she is one of my personal heroes.

Please contact me by email or telephone if you have any questions or concerns about Nina Oat. I am at your service.

Sincerely,

Anne M. Coughlin
Lewis F. Powell, Jr. Professor of Law
University of Virginia School of Law
580 Massie Rd.
Charlottesville, VA 22903
434-243-0392
434-924-7536 (fax)
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Anne Coughlin - acoughlin@law.virginia.edu - 434-243-0392

DISTRICT OF COLUMBIA COURT OF APPEALS
430 E STREET, NW
WASHINGTON, D.C. 20001

CHAMBERS OF LOREN L. ALIKHAN
Associate Judge

(202) 879-5529
LAliKhan@dcappeals.gov

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

June 8, 2023

Dear Judge Robinson,

I write to enthusiastically support the application of Virginia ("Nina") Oat for a clerkship in your chambers for 2023-24. Ms. Oat currently serves as one of my law clerks on the D.C. Court of Appeals, and she will clerk for Chief Judge Michael F. Urbanski on the U.S. District Court for the Western District of Virginia in 2022-23. She graduated from the University of Virginia School of Law, where she was an Executive Editor on *The Virginia Law Review*, and she was an associate at O'Melveny & Myers before she joined me as a law clerk.

I have known Ms. Oat since 2019, when I hired her to work as a summer intern in the Office of the Solicitor General for the District of Columbia ("D.C. OSG"). She had been highly recommended for the internship by the leadership team at the Constitutional Accountability Center, where she had worked for two years before starting law school, and she absolutely lived up to the praise her former supervisors had heaped on her. Ms. Oat quickly proved to be an excellent thinker, researcher, and writer, so much so that, despite only having one year of law school under her belt, I asked her to co-draft an important multistate amicus brief in federal district court advocating for flexibility at the state and local level in responding to the opioid crisis. This project required considerable social science and legal research, drafting under a tight timeline, and consulting with our counterparts in other states and incorporating their feedback, all of which Ms. Oat handled flawlessly. Her portion of the draft brief required minimal editing, and it later served as the foundation for a similar brief we filed in the U.S. Court of Appeals for the Third Circuit.

Given Ms. Oat's terrific appellate work as a summer intern with D.C. OSG, I encouraged her to spend her 2L summer in the appellate practice group at O'Melveny & Myers, where I had practiced appellate litigation earlier in my career. My former colleagues at O'Melveny were similarly impressed by Ms. Oat's thorough research, clear writing, and can-do attitude. In particular, she made an impression on former Deputy Solicitor General Michael Dreeben and, when she joined the firm as an associate last fall, she was assigned to work nearly exclusively with him on criminal matters in the Supreme Court—an opportunity that is virtually unheard of for a first-year associate. Having worked for Mr. Dreeben myself when I was a young lawyer in the Office of the Solicitor General at the U.S. Department of Justice, I can attest that he has incredibly high standards, and it is a real testament to Ms. Oat's abilities that he routinely turned to her with high-profile matters.

I recently had the incredible fortune to be nominated by President Biden and confirmed by the U.S. Senate to be an Associate Judge on the D.C. Court of Appeals, and I immediately stole Ms.

Oat away from Mr. Dreeben to be one of my first law clerks (thankfully, he forgave me!). As a new judge on one of the nation's busiest appellate courts, I knew I needed clerks that were thoughtful but efficient, brilliant yet humble, and serious about their work while also contributing to a collegial chambers culture. With those criteria in mind, Ms. Oat was an easy choice, and she has settled in wonderfully into the role of a law clerk.

There is so much more that I could say about Ms. Oat—how her law professors raved about her class participation, how she argued in both the Third and Fourth Circuits while in law school, how she served in leadership positions on both *The Virginia Law Review* and the moot court board—but I trust that her other recommenders will focus on those sterling credentials. Instead, I'd like to address one aspect of her application that is slightly incongruous with the rest: her transcript. To be sure, Ms. Oat did well in law school, but she did not perform as well as you might expect of someone of her caliber. There are three reasons for that. First, Ms. Oat had a medical condition that was not diagnosed until midway through the first semester of her 2L year. Once that condition was treated, her grades began to correspond with her classroom performance. Next, due to the COVID-19 pandemic, Ms. Oat had a semester of pass-fail grades when I have no doubt that she would have otherwise received As and A-s. Finally, UVA Law has an unusual grading policy where the mean grade must be a B+. This means that in the tough classes populated by uniformly high performers, such as Federal Courts and the Appellate Litigation Clinic, professors are unable to award any student an A because it would require giving another student a B-. But for this trifecta of unusual circumstances, I have every confidence that Ms. Oat would have graduated at the very top of her class.

Please do not hesitate to reach out if I can discuss Ms. Oat's candidacy further. I can be reached at 202-879-5529 or LAliKhan@dcappeals.gov.

Sincerely,

Loren L. AliKhan

Virginia (Nina) Oat

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Writing Sample. This writing sample is part of my team's brief for the finals of the William Minor Lile Moot Court Competition, Virginia Law's intramural competition. The original brief addressed two questions presented. I wrote this portion of the brief myself and it has very light edits from my competition partner. I have made edits since its initial submission, and it has been shortened for length. At the time this brief was submitted, the Supreme Court had not yet decided *Caniglia v. Strom*, 593 U.S. __ (2021).

Factual Background. Police officers arrived at Petitioner's home in response to his girlfriend's request for a wellness check. She had reported concerns about his "weird" and "crazy" behavior, and that he had threatened suicide during an argument more than a day before. When the officers arrived, they called once into Petitioner's apartment through the open front door. When they did not receive a response, they entered the home and saw bags of what they suspected to be methamphetamine in bags in a fish tank. Petitioner then arrived home and the officers arrested him for possession of methamphetamine. At no point did the officers have a warrant to enter Petitioner's home. The question on appeal was whether the warrantless home entrance was justified by the "community caretaking exception" to the Fourth Amendment's warrant requirement.

QUESTION PRESENTED

Whether law enforcement may enter residential homes without a warrant under the community caretaking exception to the Fourth Amendment's warrant requirement.

SUMMARY OF ARGUMENT

Petitioner's Fourth Amendment rights were violated when the officers entered his apartment without a warrant because the community caretaking exception to the warrant requirement does not apply to searches of residential homes. First, the Court's reasoning in *Cady v. Dombrowski*, the decision that established the exception, confines it to searches of vehicles based on the diminished Fourth Amendment protections that automobiles receive. Consistent with *Cady*'s reasoning, this Court has only ever applied the exception in subsequent cases to searches of automobiles. Second, extending the exception would turn the rigorous Fourth Amendment protection afforded to homes on its head. Rooted in English common law and the text of the Fourth Amendment, this Court's holdings have consistently deemed warrantless entries into the home presumptively unreasonable. The exigencies that do allow officers to bypass the warrant requirement are meticulously drawn and apply only in very specific circumstances. Extending the caretaking exception to homes would permit warrantless home entries any time law enforcement can claim they are acting outside of their criminal investigatory

duties. Finally, the existing "emergency aid" exception to the warrant requirement already gives law enforcement the ability to enter homes to provide the sort of assistance that concerned the court below. This Court has already addressed the caretaking role of police officers and crafted that exception to allow officers to enter homes when obtaining a warrant would be impractical to providing immediate necessary aid. Extending the community caretaking exception would unnecessarily collapse the careful boundaries of the emergency aid exception, and in doing so, uproot the rule that warrantless entries into the home are presumptively unreasonable.

ARGUMENT

I. THE FOURTH AMENDMENT PROHIBITS EXTENDING THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT TO SEARCHES OF RESIDENTIAL HOMES.

"It is a 'basic principle' of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)). It has also been long understood that "for the purposes of the Fourth Amendment, there is a constitutional difference between houses and cars," *Chambers v. Maroney*, 399 U.S. 42, 52 (1970), and that cars may be searched without a warrant in situations that would not justify a warrantless search of a home. *Carroll v. United States*, 267 U.S. 132, 153–54 (1925). The Government argues that this Court should extend an exception—one that is specific and limited to automobiles—to permit law enforcement to enter homes without a warrant if it is to perform a "caretaking" function. To do so would both misunderstand the nature of the caretaking exception and strip the home of its rigorous Fourth Amendment protections.

A. The Community Caretaking Exception is Specific and Limited to Searches of Vehicles.

The community caretaking exception originates from this Court's decision in *Cady v. Dombrowski*, which held that the warrantless search of an impounded vehicle believed to contain a firearm was permissible because the search served the "community caretaking function" of protecting the public from a gun falling into the wrong hands. 413 U.S. 433 (1973). In *Cady*, the defendant, a

Chicago police officer, crashed his rental car while driving in Wisconsin. 413 U.S. at 435–37. At the scene, the officers specifically looked for a gun because they believed that Chicago police officers were required to carry revolvers at all times. *Id.* at 436–37. They did not find the gun on the defendant's person, the car's front seat, or in the glove box. *Id.* at 437. The officers then had the car towed to a private garage and took the defendant to the police station, where they arrested him for driving under the influence. *Id.* When one of the officers later drove to the garage where the car was stored, he found that it was "left outside" with "no police guard." *Id.* In compliance with "standard procedure in [the police] department," the officer searched the car to find the gun. *Id.* During the search, he found several items subsequently used as evidence to convict the defendant for murder. *Id.* at 437–39.

This Court, recognizing that cars receive a lower level of Fourth Amendment protection than residential homes, concluded that the warrantless search of the trunk was permissible. *Id.* at 447–48. This Court explained that vehicle searches are "at least a partial exception" to the general rule that police must obtain a warrant before searching private property. *Id.* at 439; *see Chambers*, 399 U.S. at 52; *Cooper v. California*, 386 U.S. 58, 59 (1967); *Carroll*, 267 U.S. at 153–54. This exception is justified because, unlike homes, vehicles are "ambulatory" and more likely to come into "noncriminal contact" with law enforcement. *Cady*, 413 U.S. at 443. Vehicles are also highly regulated and frequently become disabled on public highways, which results in "substantially greater [noncriminal contact] than police-citizen contact in a home . . . ." *Id*. at 441. Enforcing these regulations and addressing vehicle accidents "may be described as community caretaking functions, totally divorced from [duties] relating to the violation of a criminal statute." *Id.* This Court carefully noted that the vehicle in question was "neither in the custody nor on the premises of its owner[,]" and had been placed in the garage by virtue of lawful police action. *Id.* at 447–48. And this Court took care to emphasize that *Cady* was "controlled by principles . . . extrapolated" from *Harris v. United States*, 390 U.S. 234 (1968) and *Cooper v. California*, 386 U.S. 58 (1967), both of which upheld administrative searches of impounded vehicles. *Cady*, 413 at 444–45. *Cady* emphasized, page after page, that everything about its holding had to do with the unique nature of vehicle searches.

Since *Cady* established the "community caretaking" exception, this Court has invoked the exception only twice. In both instances, the searches at issue were of vehicles. In *South Dakota v. Opperman*, an officer searched an impounded car that was towed after being illegally parked for an extended period of time. 428 U.S. 364, 366 (1976). Relying on *Cady*, *Cooper*, and *Harris*, this Court reasoned that this was a reasonable "caretaking search" because the car was lawfully impounded; the owner of the car was not present to "make other arrangements for the safekeeping of his belongings"; several valuables in the car were clearly visible from the outside; and the search was performed in compliance with standard police procedure. *Id.* at 375–76. The Court expressly emphasized that "warrantless examinations of automobiles have been upheld in circumstances which a search of a home or office would not." *Id.* at 367, 369. Noting the "significantly" lower expectations of privacy afforded to vehicles, this Court again reiterated that such warrantless administrative entries of homes are *not* permitted. *Id.* at 367 n.2 (citing *Camara v. Mun. Ct.*, 387 U.S. 523 (1967) (rejecting argument that no warrant was needed to ascertain health and safety conditions)). And in *Colorado v. Bertine*, this Court upheld an officer's search of an impounded van after its owner was arrested and before the tow truck arrived. 479 U.S. 367 (1987). Like in *Cady* and *Opperman*, the "inventory search" in *Bertine* fit with the line of cases that "accorded deference to police caretaking procedures designed to secure and protect *vehicles* and their contents within police custody." *Id.* at 372 (citing *Cooper*, *Harris*, *Cady*, and *Opperman*—all of which considered searches of vehicles) (emphasis added).

In both cases, this Court again emphasized that its reasoning was grounded in the diminished protection that vehicles receive under the Fourth Amendment. *Opperman*, 428 U.S. at 367 ("[L]ess rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."); *Bertine*, 479 U.S. at 368 (the deference accorded to police by the caretaking exception is for "procedures designed to secure and protect vehicles and their contents within police custody"). The application of *Cady* in *Opperman* and *Bertine* further confirms that the exception is limited to vehicles.

The lower courts that have declined to extend the community caretaking exception beyond searches of vehicles have done so in accordance with this Court's carefully drawn criteria to meet the community caretaking exception. In *United States v. Pichany*, the Seventh Circuit rejected the argument that the exception could be extended to an unlocked warehouse. 687 F.2d 204 (7th Cir. 1982). The court rejected the government's "novel" argument that search of a warehouse fell within the caretaking exception because "*Cady* involved the search of an impounded automobile" and *Pichany* "involve[d] the search of a business warehouse." *Id.* at 208. It correctly heeded to "express language in the *Cady* decision confining the 'community caretaker' exception to searches involving automobiles." *Id.*; *id*. ("The Court intended to confine the holding [in *Cady*] to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses.").

Similarly, the Ninth Circuit refused to apply the caretaking exception to the home when officers searched a home while responding to a burglary report. *United States v. Erickson*, 991 F.2d 529 (9th Cir. 1993). Although "[i]nvestigating reports of burglaries undoubtedly qualifies as one of these community caretaking functions," the Ninth Circuit held that such an investigation "cannot *itself* justify a warrantless search of a private residence" and refused to extend *Cady* to a search of the home because *Cady* is limited to searches of vehicles. *Id.* at 531 ("Although it involved a community caretaking function, *Cady* clearly turned on the 'constitutional difference' between searching a house and searching an automobile."). *See also Ray v. Twp. of Warren*, 626 F.3d 170 (3d Cir. 2010) (refusing to apply exception to warrantless police entry into a father's home to look for a child at mother's request); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (holding that exception applies only to vehicles).

Lower courts that *have* extended the community caretaking exception to homes have done so on faulty reasoning. *See infra* I.C. But the circuits that properly apply the exception recognize that this Court was clear in *Cady*: the community caretaking exception and its rationale were based on

factors specific to vehicles. Extending the exception to the home would undo the clear boundaries around this limited exception.

B. Extending *Cady* to Homes Would Eliminate the Rigid Protection Afforded to Houses by the Fourth Amendment.

The "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" is considered the "very core" of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 590 (1980). This stringent constitutional protection of homes is right there in the amendment's text: a person's right "to be secure in their . . . houses . . . shall not be violated." U.S. Const. amend. IV. Indeed, the Framers of the Fourth Amendment considered one's home to be a place where he must be most secure. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 643 (2009) (quoting Watchman, The Norwich Packed, and the Wkly. Advtr., Aug. 15, 1782 (no. 461), p. 3, col. 3) ("No man's dwelling, which is his castle, shall be broke open, or entered, without his own consent."). Thus, the Framers understood that in general, "a warrant must issue prior to search or seizure within the home." Laura K. Donahue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1239 (2016). Only in specific "extreme cases" could law enforcement enter a house without a warrant, such as when conducting arrests for certain serious felonies, "prevent[ing] bloodshed," quelling disorderly conduct, or capturing an escaped prisoner. 1 Joseph Chitty, *Practical Treatise on the Criminal Law* 36 (1819); 1 Richard Burn, *The Justice of the Peace, and the Parish Officer* 102–03 (14th ed. 1780); 1 Matthew Hale, *The History of the Pleas of the Crown* 589 (1736). The inclusion of these very limited exceptions suggests an understanding that absent these exigencies, warrantless entrance into the home was unlawful. *See*, *e.g.*, 2 William Hawkins, *A Treatise of the Pleas of the Crown* 138 (6th ed. 1787).

In keeping with this original understanding, this Court has drawn a "firm line at the entrance to the house," *Payton*, 445 U.S. at 590, and held that warrantless searches of a home are per se unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011) (citation omitted). This Court has consistently "declined to expand the scope of . . . exceptions to the warrant requirement to permit

warrantless entry into the home" and repeatedly redrawn that "firm line." *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018); *see Horton v. California*, 496 U.S. 128, 136–37 (1990); *see also id.* at 137 n.7 ("'[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure'"); *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977) ("It is one thing to seize without a warrant property resting in an open area . . . , and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available for the seizing officer."). Indeed, this Court has gone so far as to refuse to apply the automobile exception to a vehicle when it is located on the curtilage of a defendant's home because "the centrality of the Fourth Amendment interest [is] in the home." *Collins*, 138 S. Ct. at 1671–72. When an automobile crosses the "firm line at the entrance of the house," *Payton*, 445 U.S. at 590, the categorical automobile exception no longer applies. To extend the community caretaking exception to the home would turn on its head the deeply rooted protection of the home as one's "castle."

In practice, extending the community caretaking exception to residential homes would give law enforcement breathtakingly vast discretion to use "caretaking" duties as a pretext to perform investigatory searches. As the court below recognized, police provide a "wide range of social service[s]," including responding to mental health crises. Functions deemed "community caretaking" by lower courts include performing wellness checks; responding to noise complaints; serving process; supervising a fired live-in employee packing her personal effects; investigating toxic fumes; and investigating a plumbing problem. *Castagna v. Jean*, 955 F.3d 211, 214–15 (1st Cir. 2020); *United States v. Quezada*, 448 F.3d 1005 (8th Cir. 2006); *United States. v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996); *Commonwealth v. Baumgardner*, 1997 WL 727726, at *4 (Va. Ct. App. Nov. 21, 1997); *State v. Deneui*, 775 N.W.2d 221, 226–27 (S.D. 2009); *State v. Dube*, 655 A.2d 338, 339 (Me. 1995). The Eighth Circuit in *Quezada* summarized this expansive understanding of what a "caretaking" function can be: "Police officers, unlike other public employees, tend to be 'jacks of all trades . . . .'" 448 F.3d at 1007. Extending the community caretaking exception to residential homes would permit law

enforcement to enter homes for any possible reason that they can reasonably claim falls under their duties as "jacks of all trades"—and would give them license to completely disregard the deeply rooted principle that "physical entry of the home is the chief evil against which the . . . Fourth Amendment is directed." *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972).

C. The Emergency Aid Exception Already Strikes the Right Balance Between the Warrant Requirement and Law Enforcement's Need to Respond to Emergencies.

The court below reasoned that the community caretaking exception extends to homes because police need to perform services such as checking on those who are "likely to harm themselves, or in need of medical attention." R. at 31. But this Court has already addressed these concerns by crafting a separate "emergency aid" exception for this type of necessary home entry, which addresses these needs without giving police the sort of unbridled discretion that the decision below would permit.

Police need not obtain a warrant to enter a home if it is to "respond to emergency situations." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). Under this "emergency aid" exception, the Fourth Amendment permits law enforcement to enter homes without a warrant when they "reasonably believe that a person within is in need of immediate aid." *Id.* (emphasis added). The exception is grounded in this Court's understanding that an otherwise unlawful entrance may be permissible to "protect or preserve life or avoid serious injury" because obtaining a warrant would be counterproductive to the need for immediate action. *Id.* (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (opinion of Burger, J.)). And the relevant line of cases makes clear that the exception is limited to situations where an officer must "assist persons who are seriously injured or threatened with such injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

For example, in *Mincey v. Arizona*, 437 U.S. 385 (1978), this Court considered an exhaustive search of a house where a homicide had just occurred. It held that the emergency aid exception did *not* apply because by the time the searching officers had arrived, all the people involved in the homicide had been removed from the home. *Id.* at 389. The four-day search they performed was unrelated to the law enforcement's "right to respond to emergency situations." *Id.* at 392; *see also id.* at 393

(rejecting state's argument that a "vital public interest" permitted a general murder-scene exception). In a true emergency, time is of the essence. But once the need for entry is no longer immediate, there is no justification to skip the critical step of obtaining a warrant.

In contrast, when this Court did apply the emergency-aid exception in *Stuart*, the warrantless entrance was in response to hearing "thumping and crashing," and "people yelling 'stop, stop,'" and "get off me" from inside a house subject to a noise complaint. 547 U.S. at 406. The officers walked around to the back of the house and saw through the window "a juvenile" with "fists clenched, . . . held back by several adults" who then broke away and hit one of the adults in the face hard enough to draw blood. *Id.* This Court reasoned that the officers had an objectively reasonable basis for believing that the injured individual needed immediate assistance and that the violence they themselves witnessed would result in further imminent harm. *Id.* And in *Michigan v. Fisher*, the exception applied because the officers both saw evidence of "a recent injury, perhaps from a car accident" and saw in real time Fisher "screaming and throwing things" inside the house. 558 U.S. 45, 47–48 (2009). The officers had a reasonable belief that "Fisher had hurt himself . . . or that he was about to hurt, or had already hurt, someone else," and thus the exception applied. *Id; see also City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1769–70, 1774–75 (2015) (applying exception to assisting a mentally ill individual who threatened to stab her social worker).

The emergency aid exception—and this Court's limited application of it—illustrate two critical points. First, this Court has *already addressed* the very policy concerns that the court below used to justify expanding the community caretaking exception. The emergency aid exception is for "protect[ing] and preserv[ing] life or avoid[ing] serious injury," *Mincey*, 437 U.S. at 392, which certainly covers the lower court's concerns about individuals who may be "psychologically disaffected, likely to harm themselves, or in need of medical attention." R. at 31. Second, it is clear that while the Court was addressing these concerns, it also set careful boundaries for when the exception should apply. Time and time again, this Court has held an emergency requires that an injury be "imminent," *Mincey*, 437 U.S. at 392, and someone must be "in need of immediate aid." *Id.* at 392; *Stuart*, 547

U.S. at 406; *Fisher*, 558 U.S. 47–48; *Sheehan*, 135 S. Ct. at 1769–70, 1774–75. This approach just makes good sense. For a situation to justify bypassing the warrant mandate, it must call for immediate police action that would be hindered by stopping to get a warrant.[1] And it firmly instructs against permitting warrantless entries for situations where time is not of the essence, such as "enter[ing] some properties . . . during a heatwave or a blackout or a blizzard." R. at 31. For those sorts of circumstances, officers still have ample ability to assist community members; they just need a warrant to enter the home to do so. *See Camara*, 387 U.S. at 533 ("The question is not . . . whether [inspections of a home] may be made, but whether they may be made without a warrant."); *id.* at 534 (holding that a non-criminal investigatory search is "a significant intrusion[] upon the interests protected by the Fourth Amendment, [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees").

If the decision below stands, and police are allowed to enter homes without a warrant anytime they learn someone is acting "weird," R. at 27, then the "jealously and carefully drawn" emergency aid exception falls apart. *Randolph*, 547 U.S. at 109 (citation omitted). It will remove the immediacy requirement and instead give officers carte blanche to enter the home for any non-criminal investigatory purpose. With such unchecked discretion to enter homes, no longer would the Fourth Amendment draw a "firm line at the entrance to the house." *Payton*, 445 U.S. at 590.

[1] The requirement for *immediate* action is also the basis for several of the other existing exceptions to the warrant requirement, including preventing "imminent destruction of evidence," *Kentucky v. King*, 563 U.S. 452 (2011) and engaging in hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 42–43 (1976).

Applicant Details

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Applicant Education

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Date of BA/BS	**June 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023
The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 5401

Dear Judge Robinson,

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship for the 2024 term. As an aspiring litigator, my ambition is to study the process of reasoned appellate adjudication from the inside. Your reputation for excellence—both as a jurist and as a mentor—means there is no better place for me to do so than in your chambers. I was born and raised in Portland, Maine, and clerking near my family in the Northeast is important to me. I am also thrilled by the prospect of clerking for someone with such a rich background in state law, which I believe provides invaluable insight into the functioning of the legal system that far too many federal judges lack. This clerkship is by far my top choice; I am open to clerking in other terms if the need arises.

My experience positions me well to be an effective clerk. At Keker, Van Nest & Peters, I perform integral work on tight-knit teams preparing both for trial and for appellate litigation. This work has confirmed my interest in a career as a litigator and provided practical insight into the importance of effective advocacy. As an Articles Editor on *The University of Chicago Law Review*, I contemplate and debate novel arguments from every corner of the legal field. My track record for award-winning writing stretches back to my undergraduate years. And the depth to which I have pursued my varied interests—from coding to literature to the Chinese language—demonstrates the curiosity and appetite for intellectual challenge that would make me an asset in your chambers.

My resume, transcripts, and writing sample are enclosed. Letters of recommendation from Professors Davidson, Hubbard, and Rappaport will arrive under separate cover. If you require additional information, please do not hesitate to let me know.

Sincerely,

/s/ Max Rowe

MAX ROWE

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EDUCATION

The University of Chicago Law School, Chicago, IL, Candidate for J.D. June 2024

AWARDS: Sidley Austin Prize for Excellence in Brief Writing in the Bigelow Moot Court Competition (best 1L brief)
JOURNAL: *The University of Chicago Law Review*, Articles Editor
ACTIVITIES: Supreme Court and Appellate Society, Treasurer; International Law Society, Member; Law and Econ Society, Member

Peking University, Beijing, China, Yenching Scholar, Certificate in China Studies September 2019 – June 2021

Northwestern University, Evanston, IL, BA, *magna cum laude*, Economics and Comparative Literature, Minor in Chinese June 2018

AWARDS: American Comparative Literature Association Presidential Undergraduate Prize for Best Thesis (highest national award)
HONORS: Phi Beta Kappa; Northwestern Comparative Literature Highest Achievement in Undergraduate Research; Academic Dean's List (all quarters); tutor for Economics Department

EXPERIENCE

Keker, Van Nest & Peters LLP, *Summer Associate*, San Francisco, CA May – August 2023

- Composed research memoranda on legal questions integral to cases headed to trial, including on the admissibility of key evidence in a legal malpractice suit and on recent 9th Circuit precedent in a securities class-action
- Engaged in one-on-one strategic dialogues with partners, contributing to the formulation of litigation strategies and argument trajectories for trials

Chief Judge Rebecca Pallmeyer, Northern District of Illinois, *Judicial Intern*, Chicago, IL June – September 2022

- Researched legal issues and wrote full draft opinions for multiple cases, including on questions of copyright dispute, preliminary injunction dissolution, and complex multi-district litigation
- Analyzed and discussed civil and criminal trials, status conferences, and sentencing hearings with Chief Judge Pallmeyer

Professor Tom Ginsburg, The University of Chicago Law School, *Research Assistant*, Chicago, IL June – September 2022

- Took ownership of data analysis for forthcoming law review article from beginning to end, personally carrying out the data importation, subsequent statistical analysis, and ultimate production of visualizations that appeared in the final draft
- Executed primary-source research of multiple intergovernmental organizations' founding documents, translating them from highly technical Mandarin Chinese and assisting in comparing them to regional peers

Campaign Zero, *Leadership and Data Science Fellow*, Chicago, IL June – September 2022

- Executed original research into the effectiveness of various policy interventions on mitigating police violence, including banning chokeholds and outlawing no-knock warrants, and summarized/visualized findings for organization leaders
- Led a team of five fellows through the Campaign Zero advocacy process—from research to interpretation to campaign design
- Proposed and implemented new directions for research and later advocacy based on the results of original research and close collaboration with organization leaders

Cornerstone Research, *Analyst*, Chicago, IL; San Francisco, CA September 2018 – August 2019

- Edited major swaths of economic expert reports—taking ownership of the grace, veracity, and clarity of entire sections—relied upon in lawsuits with damages greater than $1 billion
- Executed complex regression analyses in Python and R, including multivariate time series regression, hazard models, and Monte Carlo simulations, to estimate buyer and seller behavior under counterfactual strategic regimes, which resulted in policy changes worth more than $10 million in revenue
- Created sophisticated yet lucid data visualizations that served as the centerpieces of presentations to clients and underpinned various business decisions, including a merger valued at over $30 billion
- Produced precise financial analyses in Excel, including discounted cash flows, common size financials for merger analysis, sensitivities of fund flow models, and econometric models of entry/exit effects

Northwestern University Political Union, *President*, Evanston, IL March 2017 – March 2018

- Led Northwestern's most storied debate society for one term, directing campus political leaders of all ideological stripes in the process of productive, respectful discussion
- Pioneered a new recruiting system, which increased and diversified membership by 25%

Politics and Policy, Northwestern University, *Editor in Chief*, Evanston, IL March 2016 – June 2018

- Oversaw student staff of 10+ writers, creating weekly assignments and supervising their execution
- Ensured the stylistic quality and veracity of short- and long-form pieces through line edits and one-on-one writer meetings

SKILLS & INTERESTS

Language: Full professional proficiency in Mandarin Chinese, ACTFL Advanced-High, HSK 5
Computer: Python, R, SQL, Linux, Bash, Emacs, Vim, Git, VBA, Microsoft Excel, SAS, Stata
Interests: Jazz guitar, prose writing, chess, mathematical puzzles, data analysis, fantasy sports, Arch Linux, running, weightlifting

THE UNIVERSITY OF CHICAGO

Name: **Maximillian Ayer Rowe**
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University of Chicago Law School

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Current Status: Active in Program
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Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	179
LAWS	30211	Civil Procedure William Hubbard	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	178
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	183

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	183
LAWS	30411	Property Thomas Gallanis Jr	4	4	181
LAWS	30511	Contracts Bridget Fahey	4	4	177
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	183

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Adam Davidson	2	2	183
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	177
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	177
LAWS	43220	Critical Race Studies William Hubbard	3	3	181
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182

Honors/Awards
The Sidley Austin Prize, for excellence in Brief Writing in the Bigelow Moot Court Competition

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41501	Conflict of Laws William Baude	3	3	177
LAWS	42301	Business Organizations Anthony Casey	3	3	183
LAWS	53453	Church and State Netta Barak Corren	2	2	180
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	3	3	180
LAWS	66012	Workshop: Law and Economics Adriana Robertson	1	0	IP
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	43234	Bankruptcy and Reorganization: The Federal Bankruptcy Code Anthony Casey	3	3	179
LAWS	46101	Administrative Law David A Strauss	3	3	181
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	2	2	180
LAWS	66012	Workshop: Law and Economics Adriana Robertson	1	0	IP
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 06/02/2023

THE UNIVERSITY OF CHICAGO

Name: Maximillian Ayer Rowe
Student ID: 12330895

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	180
LAWS	42801	Antitrust Law Eric Posner	3	3	180
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	2	2	180
LAWS	66012	Workshop: Law and Economics Adriana Robertson	1	0	IP
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

End of University of Chicago Law School

Date Issued: 06/02/2023


THE UNIVERSITY OF
CHICAGO

Adam Davidson
Assistant Professor of Law
The University of Chicago Law School
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June 09, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to strongly recommend Max Rowe for a clerkship in your chambers. I had the pleasure of being Max's legal research and writing professor during his 1L year. Max may have been the strongest writer that I taught as a Bigelow Fellow, and his work stands out even when compared to that of the 2Ls and 3Ls I teach now. The University of Chicago gives two 1L writing awards, one for best brief and one for overall excellence throughout the full year 1L writing course. Because he received the top score in the class during Spring Quarter, I awarded Max the Sidley Austin Prize for writing the best 1L brief. But the truth of it is, he easily could have won both prizes. His ungraded closed memo in the Fall Quarter was excellent, and his open memo in the Winter Quarter was among the top few in the class.
What makes Max's work stand out isn't just his research or ability to do legal analysis—though he certainly has both of those skills in spades—it is his facility with language. The work Max first turned into me was analytically excellent but linguistically overcomplicated; he was too likely to use a ten-dollar word when a two-dollar one would do. Most of my students who struggle with this problem also struggle to correct it. Even after receiving edits, it takes them a long time to internalize how to write simply and clearly as a matter of course. But not Max. I don't know whether he put in long hours working on his writing after that assignment, or if something just clicked, but every assignment Max turned in after that abandoned complexity for complexity's sake. His writing was clear and well organized, but he also realized how to employ linguistic choices—a well-chosen adverb here or analogy there—to maximize the force of his argument and analysis.

Given my experience with him, I would have been shocked if Max didn't make Law Review, and with little surprise, he did exactly that. Since then, the outgoing board selected him to be an Articles Editor. This too was not particularly surprising. Max has always shown a curiosity about the law that draws him toward its hardest problems. Both during his first year and afterwards we have had interesting discussions about what is happening at the forefront of criminal law and procedure, and he has already begun to turn his empirical skills towards those questions for another professor. Had I hired research assistants this year, I would have sought him out in a heartbeat. (In fact, I will likely try to hire him to do some research assistant work for me during his 3L year.)

Max is an excellent clerkship candidate. Even as a 1L, his research, analysis, and writing skills placed him at the top of the class, and the work he has done since has ensured that he has only improved from there. I give him my strongest recommendation.

Sincerely,

Adam Davidson

William H. J. Hubbard
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June 09, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I enthusiastically and highly recommend Max Rowe for a judicial clerkship. Max is intellectually curious, open minded, deeply invested in the law, and very smart. He is soft-spoken and respectful, yet self-assured, outgoing, and confident. He has a remarkable skillset: before law school, he mastered Mandarin Chinese and a half-dozen computer languages. Now as a standout law student, he is mastering an entirely new idiom. He will be an excellent clerk and an asset to your chambers.

I got to know Max through two courses I taught during his 1L year. In fall of 2021, Max was in my Civil Procedure course. Civil Procedure is a relatively large class, and I don't get to know most of my students that well—but Max stood out right away. He was deeply engaged in the course, often approaching me after class or in office hours with questions. Sometimes he sought clarification of the finer points of law; other times he had spotted an apparent inconsistency in the doctrine, and we would work through it; and yet other times, he would propose a litigation strategy or judicial innovation, and we would discuss its implications. What I loved about my interactions with Max was that his love of law and the study of law was palpable.

In the spring of 2022, Max was in my Critical Race Studies course, which was an elective offered to 1Ls. Critical Race Studies is an introduction to Critical Race Theory as well as related academic literature that studies race and the law. This course was unlike civil procedure in many respects—smaller enrollment, discussion-based teaching rather than Socratic method, weekly essays rather than an exam, and a focus on academic critique rather than legal doctrine.

Despite the very different format, Max thrived in this course as well. Max, like many students in the course, did not take it because he was already familiar with or sympathetic to the claims of Critical Race Theorists. Rather, his interest was in encountering new and challenging ideas. He was an active and thoughtful participant in the course, both in class discussion and in his written work. His contributions demonstrated deep thought, a willingness to criticize popular ideas, and creativity in looking for practical-minded solutions to the vexing problems posed by the course materials.

Max was a model of being open-minded, but independent-minded, in one's thinking. He took the arguments of critical race theorists seriously, but he did not hesitate to identify the blind spots that he saw, or to question the wisdom of policy proposals that he recognized as vulnerable to unintended consequences. His writing was scholarly in style and effective at conveying well-reasoned and creative ideas with brevity. His papers were among the best in the class while consistently also being among the shortest!

His performance in these two courses is broadly representative of his overall trajectory in terms of grades. In Civil Procedure, he earned a 177, which is a solid "B" grade (the law school enforces a strict curve with a "B" median). In Critical Race Studies, he earned a 181, a very strong "A" grade. The higher grade in the later course is consistent with his overall pattern of his grades rising after his first quarter of law school—his grades jumped up in the Winter and Spring Quarters of his 1L year with a raft of top marks. Based on my interactions with him and the trajectory of his transcript, I see his 181 in Critical Race Studies as more indicative of where he stands today as a law student.

The recognition and responsibility that he has received in the past two years confirms this view. He won the award for best 1L brief in his Legal Research and Writing course, he made Law Review, and he now serves as Articles Editor of Law Review. It's the perfect role for him, as it requires someone who is a voracious reader, a tireless worker, a perceptive critic, and a person committed to the craft of writing (and of rewriting). I believe he is all those things.

Finally, Max should be a good fit for most chambers. He is thoughtful, intellectually curious, passionate about legal work, and easy to get along with. He had a year of work experience working as an economic analyst before law school, which I believe is an important part of his background for two reasons: his workplace experience and professionalism are apparent, and his expertise in expert reports and data analysis will come in handy when he encounters complex cases involving expert reports from economists or data scientists.

In sum, Max Rowe has a strong academic record at one of the most demanding, intellectually intense law schools in the country. He has a perceptive and creative legal mind and a love of the law. He has a thoughtful, friendly demeanor, and is eager to work with you to get the law right. I enthusiastically recommend him for a judicial clerkship. I would be happy to answer any questions you have about Max, and thank you for taking the time to consider his application.

William Hubbard - whhubbar@uchicago.edu

Sincerely,

William H.J. Hubbard

William Hubbard - whhubbar@uchicago.edu

June 09, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

Max Rowe is a powerhouse student from the University of Chicago Law School Class of 2024. He won the Sidley Austin Prize for writing the best appellate brief in his section of 1L legal research and now serves as an articles editor on the Law School's flagship law review. He's bright, well-rounded, curious, and enthusiastic about the study of law—and just about everything else. How many law students describe law review as "thrilling," know a half-dozen computer programming languages, are professionally proficient in Mandarin Chinese, and have three years of work experience and interests ranging from jazz guitar to chess to weightlifting? Probably one. He's applying for a clerkship in your chambers, and I strongly recommend him to you.

Max came onto my radar last year when he was assigned to my section of 1L Criminal Law. He was excellent during our Socratic exchanges; his demeanor, calm and earnest. I could tell he had a few years on most of his classmates. Max frequented my office hours, but not because he was having trouble. Max was one of those students who wanted to push beyond what we were doing in class. I enjoyed our conversations greatly; students like Max make teaching fun. Max's analytical skills delivered at the quarter's end—he tied for the third-highest score on the exam, good for a 183 (a high A) in the course. This past quarter, Max earned a 180 in my Evidence class—a little lower, obviously, but all the other qualities I mentioned persisted. Overall, Max's academic record is strong. He was, as I mentioned, invited to join the law review, and he's easily on pace to graduate with Honors.

What sets Max apart from most of his peers is his incredible intellectual breadth and energy. At Northwestern, Max earned degrees in Economics and Comparative Literature, tutoring other students in the former field and penning a dissertation that was deemed the nation's best in the latter. Max minored in Chinese; the dissertation involved original translations of previously untranslated Chinese literature. (Having studied Chinese and lived in China myself, I can tell you this is quite a feat!) After college, Max worked as an analyst at Cornerstone Research, a firm that's produced several of the best law students I've ever had. He then headed to Beijing, where he lived for almost two years, working at Peking University, China's premier institution of higher education. Last summer, Max worked three jobs: he interned for Judge Pallmeyer on the Northern District of Illinois; combined his language and technical skills translating Chinese legal documents and analyzing the resulting data for my colleague Tom Ginsburg; and led a team of fellows as a Leadership and Data Science Fellow for Campaign Zero, a data-driven police reform shop. Simply put, Max thrives on intellectual engagement.

Max is a fairly private person, but I know a little bit about his background. He grew up in Portland, Maine. His father sells HVAC equipment and his mother is an artist and art teacher. Max's home life was difficult. I don't know all the details but I know domestic violence was involved. Max, however, is positive and resilient, soon to be the first lawyer in his family and the first to obtain a graduate degree of any kind.

Given his intelligence, work ethic, and boundless energy, I am confident that Max is headed for an impressive career in the law. I could see him as a partner someday at Keker & Van Nest, where he's spending this summer. But I could just as easily see him as a law professor. As his resume amply demonstrates, Max loves research and loves thinking and talking about ideas.

Finally, lest there be any doubt, Max is a pleasure to be around. He is kind and generous, just the type of person who naturally makes a beloved law clerk (and co-clerk). He is also respectful and fair-minded. He has opinions, but he's just as eager to hear from others as he is to share what he thinks and knows. I hope you'll take a most serious look at Max's application. If you hire him, I know you'll be glad you did.

Sincerely,

John Rappaport

John Rappaport - jrappaport@uchicago.edu - 773-834-7194

MAX ROWE
6103 S. Kenwood Apt. 3, Chicago, IL • +1 (207) 838-5616 • maxrowe@uchicago.edu

I prepared the attached writing sample in the spring of 2022 for my Legal Research and Writing class at the University of Chicago Law School. In this assignment, I was asked to write a brief for defendant-appellee Datavault on the issue of Article III standing for tort claims in connection with a fictional data breach. The fictional proceedings took place in the Seventh Circuit, and I wrote the attached appellee brief without having seen the appellant's brief. To create a 15-page writing sample, I omitted the cover page, the table of contents, the table of authorities, the conclusion, and the certificate of compliance.

For my work on the attached brief, I won the Sidley Austin Prize for Excellence in Brief Writing in the Bigelow Moot Court Competition, which is awarded to the author of the highest-graded brief on this assignment.

STATEMENT OF JURISDICTION

This case is a diversity case which the district court heard pursuant to 28 U.S.C. § 1332. The district court entered a final judgment dismissing the complaint on August 1st, 2021. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. To have standing to sue, U.S. CONST. art. III, § 2 requires that a plaintiff's alleged injuries be concrete and particularized and actual or imminent, not conjectural or hypothetical. Danny Midway, a plaintiff suing in the wake of a recent data breach, alleges nonconcrete injuries that are conjectural and hypothetical. Does Midway have standing to sue?

STATEMENT OF THE CASE

I. Statement of the Facts

A. The Parties

Davidson Datavault ("Datavault") is a password-management firm that stores usernames, passwords, and other personal information for its clients online. R2–R3. Datavault's services include automatically populating customers' stored information into online forms and monitoring the web for potential breaches of customer information. *Id.* Datavault requests and stores customers' Social Security numbers online to facilitate its monitoring service. R3.

Danny Midway ("Midway") is a Datavault customer and a small-business owner. Midway kept a raft of information stored in his Datavault "digital vault," including his credit card and banking information, logins to his business' online storefront, his Social Security number, and his social media logins. R3. Midway was previously a victim of credit card fraud following an unrelated incident. R8.

B. The Data Breach

On September 1, 2020, the Department of Homeland Security (DHS) identified a potential security vulnerability in a common piece of software, employed by Datavault, and posted a public notice recommending that its users update to the latest version to guard against the vulnerability. R4–R5. When Datavault did so on October 1, 2020, it discovered it had been the target of an illegal hack that potentially exposed the information stored in its customers' digital vaults to risk of misuse. R5. Datavault notified its customers of the hack the same day. *Id.* This notice indicated the hackers had downloaded the "internal ID," encrypted password, and digital vault of each of Datavault's ten thousand users. *Id.* Internal IDs are created by Datavault on a per-customer basis and consist of a customer's full name and Social Security number. R5.

Datavault included an offer of a year of free credit monitoring and identity theft protection along with its notification. *Id.* Datavault is one of ten known technology companies to have suffered a similar attack, *id.*, and approximately one hundred incidents of identity theft have been traced to breaches among the other nine firms, R6.

C. Midway's Response

Midway responded to Datavault's notice in various ways. First, he accepted Datavault's offer of credit monitoring and identity theft services and canceled the credit card he had stored with Datavault. R6–R7. He also began to monitor his financial accounts daily. R6. Midway then manually changed the login information he had stored in his digital vault, electing to do so over the phone. R6–R7. After canceling his old credit card, Midway placed a temporary freeze on his credit until December 2020, preventing himself from taking out a new line of credit. R7. Midway's business relies on his personal line of credit, and this had a negative impact on the business. Finally, Midway suffered emotional distress of various kinds following Datavault's notification, manifesting in insomnia, poor performance at work, and multiple sessions spent with his longtime therapist discussing his fears surrounding the breach. R8.

Midway does not allege that he, or any other Datavault customer, has been the victim of credit card fraud or identity theft since the breach. R8.

II. Proceedings Below

Midway filed suit against Datavault for negligence and implied breach of contract under Illinois law, seeking damages in excess of $100,000. R1. Midway advanced three separate theories of harm: (1) he was subject to an increased risk of identity theft and fraudulent credit card charges as a result of the breach; (2) he incurred the costs of monitoring and updating his financial accounts, including the knock-on impacts to his business; and (3) he suffered emotional distress injuries. R9.

Datavault moved to dismiss pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject-matter jurisdiction, R1, arguing that Midway lacked standing to bring his action because he failed to show he had suffered an injury in fact, R9.

The district court agreed and granted Datavault's motion. R1. This appeal followed.

SUMMARY OF THE ARGUMENT

The lower court was correct in dismissing Midway's complaint for lack of subject-matter jurisdiction. Midway failed to demonstrate he has suffered an injury in fact. Under U.S. CONST. art. III, § 2, a plaintiff has standing to sue only if they demonstrate they have suffered a concrete and particularized, and actual or imminent, invasion of a legally protected right. Midway advances three separate theories of harm, but all fall short of this threshold.

Midway alleges injuries based on his exposure to increased risk. Binding precedent expressly forecloses this theory of standing in federal suits for damages such as Midway's. Midway further alleges injury based on emotional distress he experienced in the wake of the data breach. This and other courts have consistently found such claims insufficiently concrete to establish standing. Finally, Midway alleges injuries stemming from costs he incurred to mitigate a risk of future harm. While this Circuit has recognized standing on apparently similar grounds in the past, Midway's alleged harms are not sufficiently imminent to render them analogous to these cases. Moreover, recent Supreme Court rulings raise questions about this doctrine.

Finally, Midway cannot bolster his claims of standing by making loose analogies to other common law torts.

ARGUMENT

I. Standard of Review

This Court reviews a "district court's dismissal for lack of Article III standing *de novo*." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 691 (7th Cir. 2015) (citing *Reid L. v. Illinois State Bd. of Educ.*, 358 F.3d 511, 515 (7th Cir. 2004)).

II. Midway Has Failed to Show He Suffered an Injury in Fact

Article III standing requires that a "plaintiff . . . have (1) a concrete and particularized injury in fact (2) that is traceable to the defendant's conduct and (3) that can be redressed by judicial relief." *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 937 (7th Cir. 2022) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Midway's alleged injuries—increased risk of fraud and identity theft, emotional distress, and mitigation measures to guard against this increased risk —flow from Datavault's breach and are therefore "traceable" to Datavault's conduct. *Id.* And since Midway is suing for money damages, it is equally uncontroversial that Midway's injuries would be redressed by a favorable judicial ruling. *Remijas*, 794 F.3d at 696–97.

This case turns on injury in fact, the "'[f]irst and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (citing *Lujan*, 504 U.S. at 560).

As the party invoking federal jurisdiction, Midway "bear[s] the burden of establishing Article III standing." *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016) (citation omitted). "Where, as here, a case is at the pleading stage, the plaintiff must

'clearly ... allege facts demonstrating' each element" of standing. *Spokeo*, 578 U.S. at 338 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

This Court should affirm the district court's dismissal of Midway's complaint for lack of standing; therefore, its analysis need not reach the merits of Midway's allegations. *Ewing v. MED-1 Sols., LLC*, 24 F.4th 1146, 1149 (7th Cir. 2022).

A. Risk of Future Harm Cannot Provide Standing in a Federal Suit for Damages

1. Circuit Precedent Prohibits Federal Suits for Damages for Risk of Future Harm

"Until recently there was a hint that the mere 'risk of real harm' could concretely injure plaintiffs seeking money damages." *Pierre*, 29 F.4th at 938 (quoting *Spokeo*, 578 U.S. at 341). But this Court has unambiguously interpreted the recent *TransUnion* decision as foreclosing this possibility. *E.g.*, *id.* ("[A]s the Supreme Court clarified in *TransUnion*, a risk of harm qualifies as a concrete injury only for claims for 'forward-looking, injunctive relief to prevent the harm from occurring.'" (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021))); *Ewing*, 24 F.4th at 1152 ("*TransUnion* makes clear that a risk of future harm, without more, is insufficiently concrete to permit standing to sue for damages in federal court.").

Midway is seeking damages, R1, and this portion of his standing claims rests on "an *increased risk*" of harm following Datavault's breach, R9 (emphasis added). Perhaps Midway crafted his allegations with an eye towards the "hint that the mere 'risk of real harm' could concretely injure plaintiffs seeking money damages" that laid latent in pre-*TransUnion* precedent. *Pierre*, 29 F.4th at 938. But standing doctrine has been clarified twice over since then. As the Supreme Court held in *TransUnion*, and as this Court reiterated in *Pierre* and *Ewing*, "risk . . . [is] not enough to establish an Article III injury in a suit for money damages . . . ." *Id.* at

936. This Court should affirm the district court's judgment that Midway's "increased risk" cannot establish standing; however, in light of the shifting legal landscape, it should affirm on the alternative grounds of *Pierre* and its siblings.

2. Midway Cannot Aggregate Several Insufficient Injuries into a Sufficient Injury

Against this precedential backdrop, Midway may simply concede the point. If not, he will probably emphasize that while a "risk of future harm, *without more*, is insufficiently concrete to permit standing," *Ewing*, 24 F.4th at 1152 (emphasis added), he *has* "more" in the form of his remaining allegations.

This confuses the issue. Binding precedent draws an analytic distinction between (1) risk itself and (2) the ways in which risk may give rise to injuries that "actually exist" in the present moment. *TransUnion*, 141 S. Ct. at 2211. The former was addressed in this section; the latter, in its various forms, will be addressed across the following two. Moreover, Midway not only employed this distinction in his complaint by alleging three separate harms along these lines, but took pains to mention that "*any* of these three harms is sufficient to establish an injury in fact." R10 (emphasis added). And since standing analysis is not a question of degree but rather of kind, *cf. Persinger v. Sw. Credit Sys., L.P.*, 20 F.4th 1184, 1192 (7th Cir. 2021), Midway cannot aggregate standing across his claimed injuries. If each of Midway's harms is individually insufficient to establish standing, they are insufficient to establish standing collectively.

B. Midway's Allegations of Emotional Distress Harms are Insufficient to Support Article III Standing

1. Emotional Distress Harms are Usually Insufficiently Concrete to Establish an Injury in Fact in This Circuit

"As [this Court's] bevy of recent decisions on FDCPA standing makes clear, anxiety and embarrassment are not injuries in fact." *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021). *Pierre* further clarified this doctrine, holding that "'[p]sychological states induced by a debt collector's letter,' including emotional distress, confusion, and anxiety, all fall short of showing concrete injury sufficient to support" standing. *Pierre*, 29 F.4th at 943 (Hamilton, J., dissenting) (quoting *Pierre*, 29 F.4th at 939). *Wadsworth* and *Pierre* are no aberrations. On the contrary, they are emblematic of a salutary trend in this Court's recent rulings, arising mostly out of its Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692p cases, which sees this Court exhibiting skepticism towards vaporous and perfunctory emotional distress claims.

In *Wadsworth*, this Court ruled that a plaintiff alleging "personal humiliation, embarrassment, mental anguish and emotional distress," "less sleep . . . intimidat[ion], worr[y], and embarrass[ment]," and "[s]tress [and] anxiety" lacked standing to sue. *Wadsworth*, 12 F.4th at 668 (internal quotation marks omitted). Other cases have likewise "expressly rejected 'stress' as constituting concrete injury," *id.* (quoting *Pennell v. Glob. Tr. Mgmt., LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021)); *see also Persinger,* 20 F.4th at 1191, as well as annoyance, intimidation, infuriation, disgust, indignation, *see, e.g.*, *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069, 1071 (7th Cir. 2020), aggravation, *see, e.g.*, *Markakos v. Medicredit, Inc.*, 997 F.3d 778, 782 (7th Cir. 2021), and confusion, *see, e.g.*, *Brunett v. Convergent Outsourcing, Inc.*, 982

F.3d 1067, 1068 (7th Cir. 2020). This constellation of precedent is clear enough to convince Judge Ripple that "[t]he doctrines of stare decisis and precedent require" this Court to conclude that such emotional distress harms cannot establish standing. *Markakos*, 997 F.3d at 782 (Ripple, J., concurring); *see also, id.* at 785 (Rovner, J., concurring) (writing that "[r]espect for *stare decisis* necessitates" the conclusion that "the plaintiff has failed to allege standing" on emotional distress grounds).

Midway may argue that these rulings are limited to the FDCPA context, but a cursory reading of their reasoning suggests otherwise. In *Brunett*, for instance, this Court was motivated not by concerns peculiar to the FDCPA, but rather by aversion to providing "everyone . . . standing to litigate about everything." *Brunett*, 982 F.3d at 1068. *See also Gunn*, 982 F.3d at 1071–72.

Alternatively, Midway may contend that these cases have been overruled by *TransUnion*, confusing ambiguous dicta for binding precedent. On the way to its holding, *TransUnion* noted that its plaintiffs did not allege "that they suffered some other injury (such as an emotional injury) from the mere risk." *TransUnion*, 141 S. Ct. at 2211. The Court expressly disclaimed the precedential value of this language later in the opinion. *TransUnion*, 141 S. Ct. at 2211 n.7 ("We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes."). This Circuit *has* taken a position: when emotional distress allegations are as vaporous and perfunctory as Midway's, they cannot establish standing.

2. Midway's Emotional Distress Claims are Indistinguishable from Those This Circuit Has Rejected for Standing

Midway's emotional distress harms fit comfortably among those of the plaintiffs in these cases. Midway became "incredibly worried and concerned" following the data breach, resulting

in insomnia, trouble focusing at work, and sessions spent with his longtime therapist. R7–R8. But what are Midway's claims of worry and concern if not the "mental anguish and emotional distress" this Court has rejected as grounds for standing time and again? *Wadsworth*, 12 F.4th at 668 (internal quotation marks omitted). Midway may respond by citing dicta in *Pennell* intimating that emotional distress attended by "physical manifestations" or a "qualified medical diagnosis" *can* qualify as "concrete harm." *Pennell*, 990 F.3d at 1045. But Midway can conjure no "qualified medical diagnosis"; following Datavault's breach, he merely continued to see his longtime therapist for preexisting anxiety. R8. And the "physical manifestations" of Midway's anxiety—lost sleep and lost focus—have been considered and rejected by this Court as grounds for standing. *Wadsworth*, 12 F.4th at 668 (internal quotation marks omitted).

The organizing principle of these decisions is that emotional harms are insufficiently concrete to support standing unless they lead a plaintiff to "act[] to [their] detriment." *Brunett*, 982 F.3d at 1068. For instance, a plaintiff's emotional distress might be sufficiently concrete to establish standing if it "leads a plaintiff to pay extra money, affects a plaintiff's credit, or otherwise alters a plaintiff's response to a debt." *Markakos*, 997 F.3d at 780. The reasoning behind this Court's insistence upon injuries such as these, i.e., injuries that "actually exist," *Spokeo*, 578 U.S. at 340, was put lucidly by Judge Easterbrook: "[m]any people are annoyed to learn that governmental action may put endangered species at risk . . . Yet the Supreme Court has never thought that having one's nose out of joint . . . creates a case or controversy." *Gunn*, 982 F.3d at 1071–72. One can scarcely imagine this problem would evaporate for a plaintiff who, upon learning of the governmental action, was so annoyed that they lost sleep, lost focus at work, or continued going to therapy.

3. Courts Have Generally Declined to Find Standing for Emotional Distress in Data Breach Cases

"Plaintiffs have argued that data breaches caused them emotional distress (in particular, anxiety), but courts have rejected these claims nearly every time." Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 753 (2018). While this panel need not look beyond binding precedent to determine whether Midway's emotional distress can establish standing, it is notable that courts nationwide almost uniformly reject emotional harms as grounds for standing in data breach cases. In a seminal pre-*Clapper* ruling, the Third Circuit held that emotional distress flowing from a data breach could not support Article III standing. *Reilly v. Ceridian Corp.*, 664 F.3d 38, 45 (3d Cir. 2011); *see also, e.g.*, *In re VTech Data Breach Litig.*, No. 15 CV 10889, 2017 WL 2880102, at *5 n.6 (N.D. Ill. July 5, 2017); *Crisafulli v. Amertias Life Ins. Corp.*, No. CIV.A. 13-5937, 2015 WL 1969176, at *4 (D.N.J. Apr. 30, 2015) ("Courts across the country have rejected 'emotional distress' as a basis for standing under similar circumstances."); *In re Sci. Applications Int'Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 26 (D.D.C. 2014) (holding that data breach victims "do not have standing" "even if their fears are rational" and "enough to engender some anxiety"). The Fourth Circuit came to the same conclusion in a post-*Spokeo* ruling, holding that "bare assertions of emotional injury are insufficient to confer Article III standing" in data breach cases, even when a plaintiff's Social Security number has been accessed. *Beck v. McDonald*, 848 F.3d 262, 273 (4th Cir. 2017). This Court should ratify its own binding precedent, national legal trends, and the district court's reasoned judgment by affirming the ruling below.

C. Midway's Mitigation Harms are Insufficient to Support Article III Standing

"Plaintiffs 'cannot manufacture standing by incurring costs in anticipation of non-imminent harm.' . . . 'If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear.'" *Remijas*, 794 F.3d at 694 (citations omitted) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 422, 416 (2013)). Nonetheless, "[i]n some instances, [this Court] [has] found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* at 693 (quoting *Clapper*, 568 U.S. at 414 n.5); *see Lewert,* 819 F.3d at 967; *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018).

1. *TransUnion* Undermines this Circuit's "Mitigation of Risk" Standing Doctrine

This panel must follow prior Seventh Circuit opinions "unless and until they have been overruled or *undermined* by the decisions of a higher court." *Woodring v. Jackson Cty., Indiana*, 986 F.3d 979, 993 (7th Cir. 2021) (quoting *Wilson v. Cook Cnty.*, 937 F.3d 1028, 1035 (7th Cir. 2019)). While *TransUnion* did not explicitly prohibit recognizing mitigation-based standing, it stands in some tension with the theory announced in *Remijas*. After all, "management-of-risk claim[s] [are] bound up with [] arguments about actual risk" and "necessarily rise[] or fall[] along with [the] determination of whether the risk posed . . . is itself a concrete harm." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020). *TransUnion* poleaxed risk-based standing in federal suits for money damages. S*ee supra* Part II.A. Persisting with risk-based analysis in such suits so long as a plaintiff incurs mitigation costs will leave a peculiar fossil of risk-based analysis in this Circuit's standing doctrine. This potential doctrinal

incongruity suggests that the *Remijas* cases' mitigation-based standing theory has been "undermined" by *TransUnion*; this Court would elect for coherent, rather than ad-hoc, standing doctrine by expressly overturning it.

2. Midway's Mitigation Injuries Fail to Establish Standing Under This Circuit's pre-*TransUnion* Doctrine

Alternatively, even if this Circuit's mitigation-based standing doctrine survives *TransUnion*, Midway's risk of identity theft and fraudulent credit charges is insufficiently imminent to establish standing. Midway may erroneously read *Remijas* to hold that the mere fact of a malicious data breach is sufficient to demonstrate a "substantial risk" of harm, *see Remijas*, 794 F.3d at 693, but it is important not to overread *Remijas*. Citing another in-circuit decision, the lower court's opinion extracts from *Remijas* a test of risk level turning on "the sensitivity of the data" and "the incidence of fraudulent charges and other symptoms of identity theft." R10 (internal quotation marks omitted) (citing *Kylie S. v. Pearson PLC*, 475 F. Supp. 3d 841, 846 (N.D. Ill. 2020)). This incidence consideration enjoys broad support in this and other circuits. "Generally speaking, the cases conferring standing after a data breach based on an increased risk of theft or misuse included at least some allegations of actual misuse" of the data of at least some plaintiffs or customers. *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1340 (11th Cir. 2021). This was true in *Remijas, Lewert*, and *Dieffenbach. Id.* at 1341. The district court appropriately interpreted the fact that "Midway does not allege that he, or *any other Datavault user*," R8, experienced credit fraud or identity theft in the nine months since the breach as casting doubt that Midway has "shown a substantial risk of harm." R11 (internal quotation marks omitted).

Nor do the facts that Midway has "previously been the victim of fraudulent credit card transactions after a data breach," R8, or that Datavault offered him credit and identity protection bolster the imminence of his claims. "Past exposure to illegal conduct does not . . . show a present case or controversy . . . ." *City of Los Angeles v. Lyons*, 461 U.S. 95, 95–96 (1983). And while Midway may be inspired to seize on dicta in *Remijas* hinting that an offer of such protections points towards a harm's imminence, *Remijas*, 794 F.3d at 694, in-circuit courts have held that "neither Seventh Circuit case law nor common sense support" extending this logic beyond *Remijas*. *Kylie*, 475 F. Supp. 3d at 848.

III. Midway Cannot Establish Standing via Analogy to Unalleged Harms

"When courts analyze standing, 'allegations matter.' . . . What matters here, then, is what [was] alleged in [the] operative complaint." *Pennell*, 990 F.3d at 1045 (quoting *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1246 (7th Cir. 2021)). This axiom prevents Midway from buttressing his standing claims with fresh theories of harm absent from his complaint. Despite this, Midway may be emboldened by language in *TransUnion* and *Spokeo* to plumb the common law for alternative analogues to support his standing claims. *See, e.g.*, *TransUnion*, 141 S. Ct. at 2197 (holding that "the asserted harm" must have "'a close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts" to find standing (citing *Spokeo*, 578 U. S. at 340)). This Court has considered and rejected such moves. *See, e.g.*, *Pennell*, 990 F.3d at 1045 (rejecting a late-breaking allegation that defendant "invaded her privacy" "[t]o save her claim" because "allegations matter") (quotations omitted); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 913 (7th Cir. 2017) (musing that alternative theories of harm might have supported standing but "dismissing . . . for want of standing" because plaintiff "hasn't said *any* of that"). This Court's binding precedent, as well as common sense, dictate that Midway cannot